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No. 10686

Vol 2384

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Appellee,

and

UNITED STATES OF AMERICA,

Appellant,

vs.

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

FILED
MAY 1 - 1944
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 590 Folsom St., San Francisco 60-4-27-44

No. 10686

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Amended Answer (No. Div. No. 608; So. Div. No. 510) 52

Answer (Cause 459) 40

Appeal:

- Certificate of Clerk to Transcript of Record on 116
- Notice of (No. 459) 108
- Notice of (No. 510) 109
- Order Extending Time to Docket (No. 459) 111
- Order Extending Time to Docket (No. 510) 112
- Order to Transmit Original Exhibits on (Nos. 459 and 510) 113
- Statement of Points to be Relied Upon on (CCA) 217, 219
- Stipulation Designating Contents of Record on (DC) 114
- Stipulation Designating Record for Printing (CCA) 222

Certificate of Clerk to Transcript of Record on Appeal 116

Index Page

Complaint:

Cause (No. Div. No. 608; So. Div. No. 510) 2

Cause 459 21

Decree:

Cause 459 102

Cause 510 100

Findings of Fact and Conclusions of Law:

Cause 459 86

Cause 510 94

Names and Addresses of Attorneys 1

Notice of Appeal:

Cause 459 108

Cause 510 109

Opinion (Causes 459 and 510) 74

Order as to Certain Facts (Cause 510) 107

Order Extending Time to Docket Appeal:

Cause 459 111

Cause 510 112

Order to Transmit Original Exhibits (Causes 459 and 510) 113

Order Transferring Cause 608 to Southern Division 63

Index Page

Statement of Points to be Relied Upon (CCA):

Cause 459 217

Cause 510 219

Stipulation Designating Contents of Record on Appeal (DC) 114

Stipulation for Designation of Record for Printing (CCA) 222

Stipulation of Facts:

Cause 459 64

Cause 510, filed May 26, 1943 70

Cause 510, filed Dec. 11, 1943 104

Transcript of Evidence (Cause 459)

Witnesses for Plaintiff:

Oliver, William

—direct 137

—cross 153

—redirect 156

Riley, Dr. Edward B.

—direct 120

—cross 128

—redirect 135

Index Page

Complaint:

Cause (No. Div. No. 608; So. Div. No. 510) 2

Cause 459 21

Decree:

Cause 459 102

Cause 510 100

Findings of Fact and Conclusions of Law:

Cause 459 86

Cause 510 94

Names and Addresses of Attorneys 1

Notice of Appeal:

Cause 459 108

Cause 510 109

Opinion (Causes 459 and 510) 74

Order as to Certain Facts (Cause 510) 107

Order Extending Time to Docket Appeal:

Cause 459 111

Cause 510 112

Order to Transmit Original Exhibits (Causes 459 and 510) 113

Order Transferring Cause 608 to Southern Division 63

Index Page

Statement of Points to be Relied Upon (CCA):

Cause 459 217

Cause 510 219

Stipulation Designating Contents of Record on Appeal (DC) 114

Stipulation for Designation of Record for Printing (CCA) 222

Stipulation of Facts:

Cause 459 64

Cause 510, filed May 26, 1943 70

Cause 510, filed Dec. 11, 1943 104

Transcript of Evidence (Cause 459)

Witnesses for Plaintiff:

Oliver, William

—direct 137

—cross 153

—redirect 156

Riley, Dr. Edward B.

—direct 120

—cross 128

—redirect 135

Index Page

Transcript of Evidence (Cause 510) 159

Witnesses for Plaintiff:

Dowd, Frank
—direct 193
—cross 196
—redirect 197

Hooper, J. M.
—direct 163
—cross 180
—redirect 190
—recross 191
—re-redirect 193

Steele, E. R.
—direct 213
—cross 215

Thorlackson, Fred
—direct 200

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United States District Court, Western District of Washington, Northern Division
Civil Action

File No. 608

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff, Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, and for first cause of action against the defendant alleges:

I.

The ground or jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U. S. C. A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes erroneously and illegally assessed and collected under Title IX. of the Social Security Act of the United States and also under subchapter C entitled "Tax on Employers of Eight or More" of Title 26, Section 1600 of the United States Code

and also known as Federal Unemployment Tax Act.

II.

That the United States of America is a body politic and sovereign power.

III.

That the Plaintiff is a corporation organized and exist- [1*] ing under the laws of the State of Washington relating to Fraternal Corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington.

IV.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemployment Tax Act of Title IX. of the Social Security Act of the United States for the taxable year of 1936 to 1937, and thereafter duly and regularly paid said tax in the amount of $18.68.

V.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1936 to 1937, in the amount of $18.68, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

*Page numbering appearing at foot of page of original certified Transcript of Record.

VI.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) from the Commissioner of Internal Revenue.

VII.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $18.68 together with lawful interest thereon. [2]

VIII.

That the plaintiff did not at any time during the calendar year of 1936 or 1937 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid period two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said physicians were independent contractors

for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

IX.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1936 to 1937 a musician employed by the plaintiff. That said musician was an inde- [3] pendent contractor and plaintiff exercised no control over the method or manner of the performance of the services rendered by said musician for the plaintiff, in that the services rendered by the musician consisted of playing the piano during the initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during

the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1936 to 1937 in any one calendar quarter receive in excess of $45.00, and further the duties performed by the musician were strictly ritualistic in nature.

X.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1936 to 1937 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of $45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the Act, and that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meetings held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff.

Comes now the plaintiff and for a second cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemploy-

ment Tax Act of Title IX. of the Social Security Act of the United States for the tax- [4] able year of 1937 to 1938, and thereafter duly and regularly paid said tax in the amount of $98.44.

II.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1937 to 1938 in the amount of $98.44, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) from the Commissioner of Internal Revenue, acting for and on behalf of the defendants.

IV.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $98.44, together with lawful interest thereon.

V.

That the plaintiff did not at any time during the calendar year of 1937 to 1938 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX. of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid [5] period three aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said persons were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1937 to 1938 a musician employed by the plaintiff. That said musician was an independent contractor and plaintiff exercised no control over the method or manner of the performance of the services rendered by said musician consisted of playing the piano during initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1937 to 1938 in any one calendar quarter [6] receive in excess of $45.00, and further the duties performed by the musician were strictly ritualistic in nature.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1937 to 1938 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of $45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the Act, and

that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meeting held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff.

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included the plaintiff's trustees in his assessment as taxable employees for the year 1937 to 1938, and at no time did said trustees receive in any calendar quarter compensation in excess of $45.00, and said trustees are not taxable employees within the Act, in that they do not come within the intent or contemplation of the Act, in that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director. Further, plaintiff alleges that the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included ritualistic officers of the plaintiff as taxable employees, in that ritualistic officers do not come within the intent or the contemplation of the Act and the services performed [7] by them are ritualistic in their nature, and further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period in excess of $45.00.

Comes now the plaintiff and for a third cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemployment Tax Act of Title IX, of the Social Security Act of the United States for the taxable year of 1938 to 1939, and thereafter duly and regularly paid said tax in the amount of $393.83. And that since said payment a credit has been allowed of $232.92., leaving a balance of $160.91.

II.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1938 to 1939, in the amount of $393.83, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim, and there is now a balance due and owing in the sum of $160.91.

III.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) from the Commissioner of Internal Revenue, acting for and on behalf of the defendant.

IV.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of [8] the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $160.91, together with lawful interest thereon.

V.

That the plaintiff did not at any time during the calendar year of 1938 to 1939 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX. of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid period two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said persons were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered

for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing. [9]

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1938 to 1939 a musician employed by the plaintiff. That said musician was an independent contractor and plaintiff exercised no control over the method or manner of the performance or the services rendered by said musician for the plaintiff, in that the services rendered by the musician consisted of playing the piano during initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1938 to 1939 in any one calendar quarter receive in excess of $45.00, and further the duties performed by the musician were strictly ritualistic in nature.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1938 to 1939 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of $45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the Act, and that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meetings held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the [10] plaintiff.

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included the plaintiff's trustees in his assessment as taxable employees for the year 1938 to 1939, and at no time did said trustees receive in any calendar quarter compensation in excess of $45.00, and said trustees are not taxable employees within the Act, in that they do not come within the intent or contemplation of the Act, in that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director. Further plaintiff alleges that the Collector of Internal

Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included ritualistic officers of the plaintiff as taxable employees, in that ritualistic officers do not come within the intent or the contemplation of the Act and the services performed by them are ritualistic in their nature, and further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period in excess of $45.00.

Comes now the plaintiff and for a fourth cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemployment Tax Act of Title IX. of the Social Security Act of the United States for the taxable year of 1939 to 1940, and thereafter duly and regularly paid said tax in the amount of $310.79. That since said payment a credit has been allowed in the amount of $157.70, leaving [11] a balance of $153.08.

II.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1939 to 1940, in the amount of $310.79, and set forth in said claim for refund the grounds upon

which the plaintiff founded its claim, and there is now a balance due and owing in the sum of $153.08.

III.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) from the Commissioner of Internal Revenue.

IV.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $153.08, together with lawful interest thereon.

V.

That the plaintiff did not at any time during the calendar year of 1939 to 1940 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX. of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid period two aerie

physicians as taxable employees, and the [12] plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said persons were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1939 to 1940, a musician employed by the plaintiff. That said musician was an independent contractor and plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician for the plaintiff, in that the services rendered by the musician

consisted of playing the piano during initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1939 to 1940 in any one calendar quarter receive in excess of $45.00, and further the duties [13] performed by the musician were strictly ritualistic in nature.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1939 to 1940 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of $45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the act, and that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meeting held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff.

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included the

plaintiff's trustees in his assessment as taxable employees for the year 1939 to 1940, and at no time did said trustees receive in any calendar quarter compensation in excess of $45.00, and said trustees are not taxable employees within the Act, in that they do not come within the intent or contemplation of the Act, in that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director. Further, plaintiff alleges that the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included ritualistic officers of the plaintiff as taxable employees, in that ritualistic officers do not come within the intent [14] or the contemplation of the Act and the services performed by them are ritualistic in their nature, and further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period in excess of $45.00.

IX.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment for taxable employees within the year 1939 to 1940 the plaintiff's President and Vice President, whose duties are ritualistic in nature, and the compensation received by said President and Vice President at no time was in excess of $45.00 for any calendar quarter during the afore-

mentioned period, and that said *periods* are not taxable employees within the contemplation and intent of the Act.

Wherefore, plaintiff prays for judgment against the United States of America as follows:

On the first cause of action the sum of $18.68, together with lawful interest thereon.

On the second cause of action the sum of $98.44, together with lawful interest thereon.

On the third cause of action the sum of $160.91, together with lawful interest thereon.

On the fourth cause of action the sum of $153.08, together with lawful interest thereon.

And for such other and further relief as to the court may seem equitable in the premises.

CORNELIUS C. CHAVELLE
Attorney for Plaintiff. [15]

State of Washington,
County of King—ss.

Cornelius C. Chavelle, being first duly sworn, on oath deposes and says: That he is the attorney for the plaintiff herein and has been duly authorized to represent the plaintiff, and he makes this verification for and on behalf of the plaintiff, having been authorized to do so; that he knows the contents thereof, and believes the same to be true.

CORNELIUS C. CHAVELLE.

Subscribed and sworn to before me this 29th day of October, 1942.

EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Nov. 4, 1942. [16]

United States District Court, Western District of Washington, Southern Division

File No. 459—Civil Action

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff, Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, a corporation, and for first cause of action against the defendants alleges:

I.

The ground of jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U. S. C. A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present

action instituted by the plaintiff above named is for the recovery of internal revenue taxes erroneously and illegally assessed and collected under Title VIII. of the Social Security Act of the United States and subchapter A of Chapter IX. of the Internal Revenue Code (Federal Insurance Contributions Act, as amended by Social Security Act Amendments of 1939).

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington relating to Fraternal [17] corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington, and maintains its club premises at Aberdeen, Washington.

IV.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, acting for and on behalf of the defendant, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contributions Act for the calendar year of 1938 to 1939, and thereafter duly and regularly paid said tax in the amount of $19.24.

V.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and

on behalf of the defendant, its claim for refund for taxes paid for the period of 1938 to 1939 under claim No. 432963 in the amount of $19.24, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

VI.

That on or about the 1st day of October, 1942, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with provisions of Section 3772 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America.

VII.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue was arbitrary, capricious, wrongful and illegal, and that the Collector of Internal Revenue, acting for and on behalf of the defendant, is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $19.24, together with lawful interest thereon. [18]

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessments for the aforesaid period, namely: the calendar year of 1938 to 1939 two aerie physicians as taxable employees, and the plaintiff affirmatively

alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such services were performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

IX.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the year 1938 to 1939, and that said trustees are not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties

are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are [19] in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of $45.00.

X.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the year 1938 to 1939 certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent contractor, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by said musician, in that the services rendered by the musician were of a ritualistic nature, in that they consisted of playing the piano during initiatory services held by the plaintiff and also the playing of the piano during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the calendar year of 1938 to 1939 receive in excess of $45.00 during any one calendar quarter, and further the duties performed by the musician were of a strictly ritu-

alistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of $45.00 during any calendar quarter, and therefore is not a taxable employee within the act and does not come within the contemplation or the intent of the Act, and that the treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers meetings and serves in the capacity of a [20] director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent of the Act, in that their duties are strictly ritualistic in nature and none of them receive in excess of $45.00 during any calendar quarter during the aforementioned period.

Comes now the plaintiff and for a second cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contributions Act for the calendar year of 1939 to 1940, and thereafter duly and regularly paid said tax in the amount of $22.81.

II.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and on behalf of the defendant, its claim for refund for taxes paid for the period of 1939 to 1940 under claim No. 432973 in the amount of $22.81, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 1st day of October, 1942, Notices of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America.

IV.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue was [21] arbitrary, capricious, wrongful and illegal, and that the defendant United States of America is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $22.81, together with lawful interest thereon.

V.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his

assessments for the aforesaid period, namely, the calendar year of 1939 to 1940, two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such services were performed, and the physicians were free to admnter their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the year 1939 to 1940, and that said

trustees are [22] not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of $45.00.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the United States of America, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the year 1939 to 1940 certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent contract, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician and they were of a ritualistic nature, in that they consisted of playing the piano during initiatory services held by the plaintiff and also the playing of the piano during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the calendar year of 1939 to 1940 receive in excess of $45.00

during any one calendar quarter, and further the duties performed by the musician were of a strictly ritualistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of $45.00 during any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or the intent of the Act, and that the treasurer's duties are rit- [23] ualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent of the Act, in that their duties are strictly ritualistic in nature and none of them receive in excess of $45.00 during any calendar quarter during the aforementioned period.

Comes now the plaintiff and for a third cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contribu-

tions Act for the calendar year of 1940 to 1941, and thereafter duly and regularly paid said tax in the amount of $19.20.

II.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and on behalf of the defendant, its claim for refund for taxes paid for the period of 1940 to 1941 under claim No. 432965 in the amount of $19.20, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 1st day of October, 1942, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America. [24]

IV.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue was arbitrary, capricious, wrongful and illegal, and that the defendant United States of America is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $19.20, together with lawful interest thereon.

V.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessments for the aforesaid period, namely: the calendar year of 1940 to 1941, two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such services were performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on [25] behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the year 1940 to 1941, and that said trustees are not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of $45.00.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the year 1940 to 1941 certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent contractor, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician were of a ritualistic nature, in that they consisted of playing the piano during initiatory services held by the plaintiff and also the playing of the piano

during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the calendar year of 1940 to 1941 receive in excess of $45.00 during any one calendar quarter, and further the duties perforemd by the musician were of a strictly ritualistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of $45.00 during any calendar quarter, [26] and therefore is not a taxable employee within the Act and does not come within the contemplation or the intent of the Act, and that the treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent of the Act, in that their duties are strictly ritualistic in nature and none of them received in excess of $45.00 during any calendar quarter during the aforementioned period.

Comes now the plaintiff and for a fourth cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contributions Act for the period from January 1, 1941 through September 30, 1941, and thereafter duly and regularly paid said tax in the amount of $18.86.

II.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and on behalf of the defendant, its claim for refund for taxes paid for the period of January 1, 1941, through September 30, 1941 under claim No. 432964 in the amount of $18.86, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 1st day of October, 1942, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with provisions of Section 3773 (a) (2) of the Inter-
[27] nal Revenue Code from the Commissioner of Internal Revenue of the United States of America.

IV.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the

Commissioner of Internal Revenue was arbitrary, capricious, wrongful and illegal, and that the defendant United States of America is now wrongfully withholding from the plaintiff without its consent and against its will the amount of $18.86, together with lawful interest thereon.

V.

That the Collector of Internal Revenue acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessments for the aforesaid period, namely: the period from January 1, 1941 through September 30, 1941, two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of

the business for which such services were performed, and the physicians were free to administer their treatment and other- [28] wise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the period from January 1, 1941 through September 30, 1941, and that said trustees are not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of $45.00.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the deefndant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the period from January 1, 1941 through September 30, 1941, certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent con-

tractor, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician were of a ritualistic nature, in that they consisted of playing the piano during initatory services held by the plaintiff and also the playing of the piano during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period from January 1, 1941 through September 30, 1941, receive in execess of $45.00 during any one calendar quar- [29] ter, and further the duties performed by the musician were of a strictly ritualistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of $45.00 during any calendar quarter, and therefore is not a taxable employee within the act and does not come within the contemplation or intent of the Act, and that the treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers' meetings and serves in the capacity of a director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent

of the Act, in that their duties are strictly ritualistic in nature and none of them receive in excess of $45.00 during any calendar quarter during the aforementioned period.

Wherefore, plaintiff prays for judgment against the United States of America as follows:

On the first cause of action the sum of $19.24, together with lawful interest thereon.

On the second cause of action the sum of $22.81, together with lawful interest thereon.

On the third cause of action the sum of $19.20, together with lawful interest thereon.

On the fourth cause of action the sum of $18.86, together with lawful interest thereon. And for such other and further relief as to the court may seem equitable in the premises.

CORNELIUS C. CHAVELLE,
Attorney for Plaintiff. [30]

State of Washington
County of King—ss.

Cornelius C. Chavelle, being first duly sworn, on oath deposes and says: That he is the attorney for said plaintiff, and that he makes this verification for and on behalf of said plaintiff, having been authorized to do so, and that he knows the contents thereof, and believes the same to be true.

CORNELIUS C. CHAVELLE

Subscribed and Sworn to before me this 5th day of November, 1942.

EDWARD H. CHAVELLE

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Nov. 5, 1942. [31]

In the District Court of the United States for the Western District of Washington, Southern Division

Civil Action

No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ANSWER

Now comes the Defendant, the United States of America, by its attorney, J. Charles Dennis, United States Attorney for the Western District of Washington, and in answer to plaintiff's complaint states:

ANSWER TO FIRST CLAIM

1.

The allegations contained in paragraph I of the first claim of plaintiff's complaint are admitted, except the allegations that the tax there referred to was erroneously or illegally assessed or collected, or erroneously and illegally assessed and collected, which allegations are denied.

2.

The allegations contained in paragraph II of the first claim of plaintiff's complaint are admitted.

3.

The allegations contained in paragraph III of the first claim of plaintiff's complaint are admitted, except the allegation that plaintiff has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington, which allegation, for lack of sufficient information on which to form a belief, is denied. [32]

4.

The allegations contained in paragraph IV of the first claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed both original and supplementary quarterly returns for 1938, under Title VIII of the Social Security Act; that said returns indicated an amount due of $53.08, consisting of principal of tax and interest; that said amount was paid by plaintiff.

5.

The allegations contained in paragraph V of the first claim of plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of $19.24 with respect to 1938; that said purported claim for refund set forth the grounds on which it was filed.

6.

The allegations contained in paragraph VI of the first claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2), which allegation, since said section has no pertinence to the matter at hand, is denied.

7.

The allegations contained in paragraph VII of the first claim of plaintiff's complaint are denied.

8.

The allegations contained in paragraph VIII of the first claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

9.

The allegations contained in paragraph IX of the first claim of [33] plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as taxable employees, which allegation is admitted.

10.

The allegations contained in paragraph X of the first claim of plaintiff's complaint are denied, except the allegation that the treasurer, the president, the vice president, and certain committee members, namely, members of the audit committee, there referred to were included as taxable employees, which allegation is admitted. Without limitation by specification, defendant specifically denies that the musician there referred to was included as a taxable employee.

11.

Further answering the first claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO FIRST CLAIM

12.

As an affirmative defense to the first claim of plaintiff's complaint, in the event the musician referred to in paragraph X of the first claim of plaintiff's complaint was included as a taxable employee for 1938, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to this musician since this individual does not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph V of the first claim of plaintiff's complaint.

ANSWER TO SECOND CLAIM

13.

The allegations contained in paragraph I of the second claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed both original and supplementary quarterly returns for 1939 under Title [34] VIII of the Social Security Act; that said returns indicated an amount due of $59.12 consisting of principal of tax and interest; that said amount was paid by plaintiff.

14.

The allegations contained in paragraph II of the second claim of plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of $22.81 with respect to 1939; that said purported claim for refund set forth the grounds on which it was filed.

15.

The allegations contained in paragraph III of the second claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2), which allegation, since said section has no pertinence to the matter at hand, is denied.

16.

The allegations contained in paragraph IV of the second claim of plaintiff's complaint are denied.

17.

The allegations contained in paragraph V of the second claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

18.

The allegations contained in paragraph VI of the second claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as taxable employees, which allegation is admitted. [35]

19.

The allegations contained in paragraph VII of the second claim of plaintiff's complaint are denied, except the allegation that the treasurer, the president, and certain committee members, namely, members of the audit committee, there referred to were included as taxable employees, which allegation is admitted. Without limitation by specification, defendant specifically denies that the musician and the vice president there referred to were included as taxable employees.

20.

Further answering the second claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO SECOND CLAIM

21.

As an affirmative defense to the second claim of

plaintiff's complaint, in the event the musician and the vice president referred to in paragraph VII of the second claim of plaintiff's complaint were included as taxable employees for 1939, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to this musician and this vice president since they do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the second claim of plaintiff's complaint.

ANSWER TO THIRD CLAIM

22.

The allegations contained in paragraph I of the third claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed both original and supplementary quarterly returns for 1940 under the Federal Insurance Contributions Act; that said returns indicated an amount due of $57.84, consisting of principal of tax and interest; that said amount was paid by plaintiff. [36]

23.

The allegations contained in paragraph II of the third claim of plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843, what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of $19.20 with respect to 1940; that said purported claim for refund set forth the ground on which it was filed.

24.

The allegations contained in paragraph III of the third claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2) which allegation, since said section has no pertinence to the matter at hand, is denied.

25.

The allegations contained in paragraph IV of the third claim of plaintiff's complaint are denied.

26.

The allegations contained in paragraph V of the third claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

27.

The allegations contained in paragraph VI of the third claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that the trustees there referred to were included as taxable employees.

28.

The allegations contained in paragraph VII of the third claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that any alleged ritualistic officers such [37] as the musician, the treasurer, the president and vice president, and certain committee members there referred to were included as taxable employees.

29.

Further answering the third claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO THIRD CLAIM

30.

As an affirmative defense to the third claim of plaintiff's complaint, in the event the trustees, referred to in paragraph VI of the third claim of plaintiff's complaint and the certain alleged ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members referred to in paragraph VII of the third claim of plaintiff's complaint were included as taxable employees for 1940, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to these, since they do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the third claim of plaintiff's complaint.

ANSWER TO FOURTH CLAIM

31.

The allegations contained in paragraph I of the fourth claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed quarterly returns for the period January 1, 1941 through September 30, 1941, under the Federal Insurance Contributions Act; that said returns indicated an amount

due of $47.51, principal of tax; that said amount was paid by plaintiff.

32.

The allegations contained in paragraph II of the fourth claim of [38] plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of $8.86 with respect to the period January 1, 1941 through September 30, 1941; that said purported claim for refund set forth the ground on which it was filed.

33.

The allegaitons contained in paragraph III of the fourth claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2), which allegation, since said section has no pertinence to the matter at hand, is denied.

34.

The allegations contained in paragraph IV of the fourth claim of plaintiff's complaint are denied.

35.

The allegations contained in paragraph V of the fourth claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

36.

The allegations contained in paragraph VI of the fourth claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that the trustees there referred to were included as taxable employees.

37.

The allegations contained in paragraph VII of the fourth claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that any alleged ritualistic officers such [39] as the musician, the treasurer, the president and vice president, and certain committee members there referred to were included as taxable employees.

38.

Further answering the fourth claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSES TO FOURTH CLAIM

39.

As an affirmative defense to the fourth claim of plaintiff's complaint, in the event the trustees referred to in paragraph VI of the fourth claim of plaintiff's complaint and the certain alleged ritualistic officers, such as the musician, the treasurer, the president and vice president, and certain committee members referred to in paragraph VII of the fourth claim of plaintiff's complaint were included

as taxable employees for the period January 1, 1941 through September 30, 1941, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to these since they do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the fourth claim of plaintiff's complaint.

40.

As a further affirmative defense to the fourth claim of plaintiff's complaint, in the event plaintiff is entitled to recover any amount under this claim, defendant alleges that this Court has no jurisdiction to grant plaintiff any amount in excess of $8.86, principal of tax, since this constitutes the extent of the relief claimed in what purported to be the claim for refund referred to in paragraph II of the fourth claim of plaintiff's complaint. [40]

Wherefore defendant prays judgment that the complaint of the plaintiff be dismissed with costs to the defendant.

J. CHARLES DENNIS
United States Attorney
HARRY SAGER
Asst. United States Attorney
THOS. R. WINTER
Special Rep. to the General Counsel

[Endorsed]: Filed Feb. 3, 1943. [41]

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action

No. 608

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER

Now comes the defendant, United States of America, by its attorney, J. Charles Dennis, United States Attorney for the Western District of Washington, and in answer to plaintiff's complaint states:

ANSWER TO FIRST CLAIM

1.

The allegations contained in paragraph I of the first claim of plaintiff's complaint are admitted, except the allegations that the tax there referred to was erroneously or illegally assessed or collected, or erroneously and illegally assessed and collected, which allegations are denied.

II.

The allegations contained in paragraph II of the first claim of plaintiff's complaint are admitted.

3.

The allegations contained in paragraph III of the first claim of plaintiff's complaint are admitted, except the allegation that plaintiff has paid all license fees now due and owing by it to operate a fraternal corporation in the state of Washington which allegation, for lack of sufficient information on which to form a belief, is denied. [42]

4.

The allegations contained in paragraph IV of the first claim of plaintiff's complaint are denied. Defendant avers that on January 17, 1941, plaintiff filed its annual return for 1936 under Title IX of the Social Security Act; that said return indicated an amount due of $18.68, consisting of principal of tax penalty and interest; that said amount was paid by plaintiff.

5.

The allegations contained in paragraph V of the first claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of Federal Unemployment Compensation Taxes in the amount of $18.68 illegally collected with respect to 1936; that said purported claim for refund set forth the grounds on which it was filed.

6.

The allegations contained in paragraph VI of the first claim of plaintiff's complaint are admitted; except the allegation referring to Section 3773 (a)

(2) which allegation, since said section has no pertinence to the matter at hand, is denied.

7.

The allegations contained in paragraph VII of the first claim of plaintiff's complaint are denied.

8.

The allegations contained in paragraph VIII of the first claim of plaintiff's complaint are denied, except the allegations that the two Aerie physicians referred to were included as taxable employees which allegation is admitted. [43]

9.

The allegations contained in paragraph IX of the first claim of plaintiff's complaint are denied, except the allegation that the musician there referred to was included as a taxable employee which allegation is admitted.

10.

The allegations contained in paragraph X of the first claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee which allegation is admitted.

11.

Further answering the first claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

ANSWER TO SECOND CLAIM

12.

The allegations contained in paragraph I of the second claim of plaintiff's complaint are denied. Defendant avers that on January 17, 1941, plaintiff filed its annual return for 1937 under Title IX of the Social Security Act; that said return indicated an amount due of $98.44, consisting of principal of tax, penalty and interest; that said amount was paid by plaintiff.

13.

The allegations contained in paragraph II of the second claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of Federal Unemployment Compensation Taxes in the amount of $98.44 illegally collected with respect to 1937; that said purported claim for refund set forth the grounds on which it was filed. [44]

14.

The allegations contained in paragraph III of the second claim of plaintiff's complaint are admitted, with the following exceptions: The allegation that the claim for refund there referred to was disallowed on September 6, 1941, is denied; the allegations referring to Section 3773 (a) (2), since said section has no pertinence to the matter at hand, is denied. Defendant avers that the claim for refund there referred to was disallowed on March 25, 1942.

15.

The allegations contained in paragraph IV of the second claim of plaintiff's complaint are denied.

16.

The allegations contained in paragraph V of the second claim of plaintiff's complaint are denied, except the allegation that the three Aerie physicians there referred to were included as taxable employees, which allegation is admitted.

17.

The allegations contained paragraph VI of the second claim of plaintiff's complaint are denied, except the allegation that the musician there referred to was included as a taxable employee, which allegation is admitted.

18.

The allegations contained in paragraph VII of the second claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee, which allegation is admitted.

19.

The allegations contained in paragraph VIII of the second claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as [45] taxable employees, which allegation is admitted. Defendant avers that the trustees so included as taxable employees were three in number.

20.

Further answering the second claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO FIRST CLAIM

21.

As an affirmative defense to the second claim of plaintiff's complaint, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to the treasurer, referred to in paragraph VII of the second claim of plaintiff's complaint, since this individual does not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the second claim of plaintiff's complaint.

ANSWER TO THIRD CLAIM

22.

The allegations contained in paragraph I of the third claim of plaintiff's complaint are denied, except the allegation that a credit has been allowed in the amount of $232.92, which allegation is admitted. The defendant avers that on January 17, 1941, plaintiff filed its annual return for 1938 under Title IX of the Social Security Act; that said return indicated an amount due of $393.82, consisting of principal of tax, penalty and interest; that said amount was paid by plaintiff.

23.

The allegations contained in paragraph II of the third claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a [46] claim for refund of Federal Unemployment Compensation Taxes in the amount of $393.82 illegally collected with respect to 1938; that said purported claim for refund set forth the grounds on which it was filed.

24.

The allegations contained in paragraph III of the third claim of plaintiff's complaint are admitted, except the allegation referring to Section 3773 (a) (2) which allegation, since said section has no pertinence to the matter at hand, is denied.

25.

The allegations contained in paragraph IV of the third claim of plaintiff's complaint are denied.

26.

The allegations contained in paragraph V of the third claim of plaintiff's complaint are denied, except the allegation that the two Aerie physicians referred to were included as taxable employees, which allegation is admitted.

27.

The allegations contained in paragraph VI of the third claim of plaintiff's complaint are denied, except the allegation that the musician there re-

ferred to was included as a taxable employee, which allegation is admitted.

28.

The allegations contained in paragraph VII of the third claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee, which allegation is admitted.

29.

The allegations contained in paragraph VIII of the third claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as taxable employees, which allegation is admitted. Defendant [47] avers that the trustees so included as taxable employees were three in number.

30.

Further answering the third claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO THIRD CLAIM

31.

As an affirmative defense to the third claim of plaintiff's complaint, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to the trustees referred to in paragraph VIII of the third claim of plaintiff's complaint, since these individuals do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in

paragraph II of the third claim of plaintiff's complaint.

ANSWER TO FOURTH CLAIM

32.

The allegations contained in paragraph I of the fourth claim of plaintiff's complaint are denied, except the allegation that a credit has been allowed in the amount of $157.70, which allegation is admitted. Defendant avers that on January 17, 1941, plaintiff filed its annual return for 1939 under Title IX of the Social Security Act; that said return indicated an amount due of $310.79, consisting of principal of tax, penalty and interest; that said amount was paid by plaintiff.

33.

The allegations contained in paragraph II of the fourth claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a [48] claim for refund of Federal Unemployment Compensation Taxes in the amount of $310.79 illegally collected with respect to 1939; that said purported claim for refund set forth the grounds on which it was filed.

34.

The allegations contained in paragraph III of the fourth claim of plaintiff's complaint are admitted, except the allegation referring to Section 3773 (a) (2) which allegation, since said section has no pertinence to the matter at hand, is denied.

35.

The allegations contained in paragraph IV of the fourth claim of plaintiff's complaint are denied.

36.

The allegations contained in paragraph V of the fourth claim of plaintiff's complaint are denied, except the allegation that the two Aerie physicians referred to were included as taxable employees, which allegation is admitted.

37.

The allegations contained in paragraph VI of the fourth claim of plaintiff's complaint are denied, except the allegation that the musician there referred to was included as a taxable employee, which allegation is admitted.

38.

The allegations contained in paragraph VII of the fourth claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee, which allegation is admitted.

39.

The allegations contained in paragraph VIII of the fourth claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as [49] taxable employees, which allegation is admitted. Defendant avers that the trustees so included as taxable employees were three in number.

40.

The allegations contained in paragraph IX of the fourth claim of the plaintiff's complaint are denied, except the allegation that the president and vice-president there referred to were included as taxable employes, which allegation is admitted.

41.

Further answering the fourth claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO FOURTH CLAIM

42.

As an affirmative defense to the fourth claim of plaintiff's complaint, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to the trustees referred to in paragraph VIII of the fourth claim of plaintiff's complaint, or with respect to the president and vice-president referred to in paragraph IX of the fourth claim of plaintiff's complaint, since these individuals do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the fourth claim of plaintiff's complaint.

Wherefore defendant prays judgment that the complaint of the plaintiff be dismissed with costs to the defendant.

/s/ J. CHARLES DENNIS
United States Attorney.

Copy received, March 29, 1943.

CHAVELLE & CHAVELLE
Attys. for Pltf.

[Endorsed]: Filed Mar. 29, 1943. [50]

[Title of District Court and Cause.]

Civil Action

No. 608

ORDER

Upon the stipulation of the above parties, through their respective attorneys, and good cause appearing therefor, it is hereby

Ordered that the above entitled case be transferred to the Southern Division of this Court for assignment for trial.

Dated this 2nd day of April, 1943.

LLOYD L. BLACK
United States District Judge

Presented by:

THOMAS R. WINTER

[Endorsed]: Filed April 7, 1943. [51]

In the District Court of the United States, for the Western District of Washington, Southern Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, a corporation,

Plaintiff.

v.

UNITED STATES OF AMERICA

Defendant.

STIPULATION

It is hereby stipulated by and between the parties, through their respective attorneys, that the following facts may be taken as true at the trial of this cause or any subsequent proceedings therein:

I.

The ground of jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U.S.C.A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present action instituted by the plaintiff above-named is for the recovery of internal revenue taxes assessed and collected under Title VIII of the Social Security Act of the United States and subchapter A of Chapter IX of the Internal Revenue Code (Federal Insurance Contributions Act, as amended by Social Security Act Amendments of 1939).

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and [52] existing under the laws of the State of Washington relating to Fraternal corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington, and maintains its club premises at Aberdeen, Washington.

IV.

The plaintiff filed original and supplemental quarterly returns for 1938, and paid tax thereon of $53.08. The original and supplemental quarterly returns were filed for 1939 on which a tax was paid of $59.02, and for 1940, on which a tax was paid of $57.84. Plaintiff also filed a quarterly return for the period January 1, 1941, through September 30, 1941, on which a tax was paid of $47.51.

On January 23, 1942, plaintiff filed separate claims for refund on Form 843, as follows: For the year 1938 in the amount of $19.24; for the year 1939 in the amount of $22.81; for the year 1940 in the amount of $19.20, and for the period of January 1, 1941, through September 30, 1941, in the amount of $8.86. The claims for refund are based on the plaintiff's contention that its Aerie physician and certain of its officers are not employees for the purpose of the Social Security Act, and more particularly alleges as follows:

Year 1938

1. Tax was erroneously assessed on our doctor, trustees, and ritualistic officers.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. His S.S. No. and name is: 534-18-9612, Dr. E. B. Riley.
3. C. B. 1937-1, 462; C. B. 1937-2, 403 and C. B. 1939-2, 295. [53]
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those erroneously assessed as above are: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Chas. Martin, John Woodcock, Luther Brownrigg, Vernon Bagley, Harry I. Tucker, Caleb Merritt.
5. No part of the above tax was paid by the so-called employees.

Year 1939

1. Tax was erroneously assessed on doctors, ritualistic officers, and trustees.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. Dr. E. B. Riley, 534-18-9612.

3. C. B. 1937-1, 462; C. B. 1937-2, 403 & 448; C. B. 1939-2, 295.
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those so erroneously assessed are as follows: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Chas. Martin, Milton Jones, Roy Sims, H. E. West.
5. No part of the above tax was paid by the so-called employees.

Year 1940

1. Tax was erroneously assessed on our doctor elected by our members on a contract basis to render the sick and health benefits of our lodge. See: C. B. 1937-1, 462; C. B. 1937-2, 403; C. B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.
3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so we would be discriminated against if we are not given the exemption. [54]
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.
5. No part of the above tax was paid by the so-called employees.

Period January 1, 1941, to
September 30, 1941.

1. Tax was erroneously paid on our doctor elected by our members on a contract basis to render the sick and health benefits of our lodge. See C.B. 1937-1, 462; C.B. 1937-2, 403; C.B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefiit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.
3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so would be discriminated against if we are not given the exemption.
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.

V.

The Commissioner of Internal Revenue, by a letter dated October 1, 1942, disallowed plaintiff's four

claims for refund. The present action was timely filed on November 15, 1942.

J. CHAS. DENNIS
United States Attorney.
HARRY SAGER
Assistant United States Attorney.
THOMAS R. WINTER
Special Assistant to Chief Counsel,
Bureau of Internal Revenue.
Attorneys for Defendant.
CORNELIUS C. CHAVELLE
Attorney for Plaintiff.

[Endorsed]: Filed May 25, 1943. [55]

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action

So. Div. No. 510

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION

It is hereby stipulated by and between the parties, through their respective attorneys, that the following facts may be taken as true at the trial of this cause or any subsequent proceedings therein:

I.

The ground or jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U.S.C.A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes assessed and collected under Title IX. of the Social Security Act of the United States and also under subchapter C entitled "Tax on Employers of Eight or More" of

Title 26, Section 1600 of the United States Code and also known as Federal Unemployment Tax Act.

II.

That the United States of America is a body politic and sovereign power.

III.

That the Plaintiff is a corporation organized and [56] existing under the laws of the State of Washington relating to Fraternal Corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington.

IV.

On January 17, 1941, plaintiff filed its annual returns under Title IX of the Social Security Act for the periods indicated and on March 4, 1941, paid taxes with respect thereto as follows:

1936	$ 18.68
1937	98.00
1938	393.82
1939	310.79

On July 16, 1941, plaintiff filed claims for refund of the amounts of tax above indicated on the ground that during these years it was not an employer of eight or more individuals and consequently not subject to this tax. Certified copies of such claims are attached hereto, marked Exhibits A, B, C and D, respectively, and made a part hereof. These claims for refund, with respect to 1936, 1938 and 1939, were denied on September 6, 1941. The claim for

refund with respect to 1937 was denied on March 25, 1942.

V.

Pursuant to a certificate of overassessment, on or about April 15, 1942, there was refunded to the plaintiff $232.92 with respect to its taxes for 1938, and $157.70 with respect to its taxes for 1939, being credits allowable for contributions paid by the plaintiff to the State of Washington. The result of these refunds was to reduce the net amount of taxes paid by the plaintiff for 1938 to $160.90, and that paid for 1939 to $153.09. [57]

VI.

The present action was commenced on or about November 4, 1942, by the plaintiff for the recovery of the following amounts, relative to the taxable periods indicated:

1936	$ 18.68
1937	98.44

1938	160.91
1939	153.08

J. CHAS. DENNIS
United States Attorney.
HARRY SAGER
Assistant United States Attorney.
THOMAS R. WINTER
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
Attorneys for Defendant.
CORNELIUS C. CHAVELLE
Attorney for Plaintiff.

[Endorsed]: Filed May 26, 1943. [58]

In the District Court of the United States for the Western District of Washington,
Southern Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil Action
File No. 510

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil Action
File No. 466

SEATTLE AERIE No. 1 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA,
Defendant.

OPINION

Before Charles H. Leavy, United States District Judge, Tacoma, Washington.

Cornelius C. Chavelle, Chavelle and Chavelle, Dexter Horton Building, Seattle, Washington
Attorneys for Plaintiffs.

J. Charles Dennis, United States Attorney
Harry Sager, Asst. United States Attorney
Thomas R. Winter, Special Representative to the General Counsel, Bureau of Internal Revenue
Attorneys for Defendant. [59]

These three cases will be considered together for the purpose of disposition, since they all involve a construction of certain parts of Titles VIII and IX of the Social Security Act before its amendment in 1939. The plaintiff in each case is a subordinate Aerie of the Fraternal Order of Eagles, and the defendant is Clark Squire, as Collector of Internal Revenue in this District. The actions are to recover sums assessed by the Government and paid by the plaintiffs.

For convenience, I shall refer to Cause No. 459 as the Aberdeen case; Cause No. 608 as the Ballard Case, and Cause No. 466 as the Seattle Case.

The specific question presented in the Aberdeen Case is whether the Aerie physician, the president, vice president and treasurer, trustees and members of the audit committee, of a subordinate Aerie of the Fraternal Order of Eagles constitute employees under Section 811(b) and Section 1101(a) of the Social Security Act and Section 1426(b) and (d) of the Internal Revenue Code for the purposes of the tax imposed under Title VIII of the Social Security Act and under the Federal Insurance Contributions Act.

In the Ballard Case, the question presented is whether the physician, the treasurer and the trustees of a subordinate Aerie of the Fraternal Order of Eagles, and a musician performing services for the Aerie, constitute employees under Title Ix of the Social Security Act and Chapter 9, Subchapter C of the Internal Revenue Code.

It might be noted that in both cases mentioned the question presented are of first impression, and there is no precedent resting upon a similar set of facts.

In the Seattle Case, the question presented is whether members of an orchestra performing services for taxpayer [60] constitute its employees under the provisions of the Social Security Act and Chap. 9, Sub-chapters A and C of the Internal Revenue Code.

A disposition of the issues raised by these actions involves an interpretation of certain provisions of Titles VIII and IX of the Social Security Act, prior to its amendment in 1939. In each case there is a stipulation on file dealing with the amounts involved for the years in question, and also the individuals or groups on whom tax was paid and refund demanded. The proof submitted was very limited, heard as to the three cases at the same time.

In order to bring the Aberdeen and Ballard Aeries within the provisions of the Social Security Act prior to amendment, it is necessary to hold that the various officers of these two organizations be considered as employees as distinguished from mere ritualistic officers or independent contractors. If the facts establish the relationship of employer and employee as between these subordinate lodges and their officers, who are chosen in accordance with the provisions of their constitution provided for them by the Grand Aerie, then the actions would have to be dismissed insofar as they involve the Aberdeen and Ballard cases. If, on the other hand, that rela-

tionship does not exist, then the plaintiffs should prevail in these two cases, insofar as they have complied with the laws and regulations involving a refund of taxes erroneously assessed.

In the Seattle Case, the issue involves only the question of whether the orchestra that furnished music for dances held at regular intervals was an orchestra supplied by an independent contractor, or whether the orchestra members were employees of the Seattle Aerie. [61]

All three of these organizations are incorporated under the laws of the State of Washington, which specifically provide for the incorporation of fraternal organizations and distinguish them from commercial corporations, and relieve them from the payment of any tax or annual license fees.

With the exception of the musicians employed by the Ballard Aerie, and the orchestra that furnished music for the Seattle Aerie, all of the other individuals involved were essential and required officers of the subordinate Aeries provided for by their constitution. Their duties are enumerated in detail in constitution, and then it is provided therein what the compensation of certain officers shall be, and with other officers the matter of fixing compensation is left to the discretion of the local Aerie. This compensation, with the exception of the Aerie Physician and Secretary, is a very nominal sum, being as low as 33 1/3c per month for the Worthy President and Worthy Vice President, and a number of the other officers of the Aerie, who are either elective or appointive, receive a compensation of $1.00 per month.

The first issue that must be disposed of here involves an interpretation of the word "employee". The Act of Congress itself gives only a most broad and comprehensive definition, and leaves detail to the Treasury Department. That Department, by Article 3, Regulation 91, furnishes a more detailed definition of the term "employee", and then distinguishes between an independent contractor and an employee.

There is a great wealth of authority to be found on the question of when one is an employee. No good could come from attempting to analyze in any degree of detail [62] the innumerable cases touching this subject. It does seem to this Court that a very clear statement as to when the relationship of employer and employee exists is found in 35 Am. Jur., Page 445, Sec. 3, Master and Servant, where *is* is stated:

> "While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists,—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of the control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done."

In Deecy Products Co. v. Welch, 124 Fed. 2nd 592, a well-considered opinion from the First Circuit, dealing with an interpretation of the provisions of the Social Security Act herein involved, the Court said:

> "We hold that an employee is one who meets the tests of the more or less established concept of 'the legal relationship of employer and employee' ".

We need but cite this case from the First Circuit Court of Appeals to note that the construction and application of the laws herein involved are based upon the accepted tests as enumerated in the quotation from American Jurisprudence.

It is argued by the plaintiffs that the Act, as originally passed by Congress, never intended to include fraternal organizations, and this was established by the very fact that when, by Departmental regulation and interpretation, they were included, Congress immediately clarified the Act by excluding them. The case of Hassett vs. Associated Hospital Service Corporation, 125 Fed. 2nd 611, from the First Circuit, strongly supports the position taken by the plaintiffs. [63] The Court said:

> "That the Congress in enacting the Social Security Act did not expressly exempt corporations operating a non-profit hospital service plan does not legitimately warrant the inference that Congress intended such organizations not to be exempt from the Act."

I do not feel that *is* is necessary, in making a

disposition of these cases, to decide what the intent of Congress was in enacting the Act, insofar as it involved groups, classes and persons to be exempt, and shall therefore rest my decision entirely upon the question of whether the members of fraternal organizations, as here involved, when occupying official positions, either by election of their fellow members or by appointment of the elected presiding officer, such positions being for a limited term, usually one year, should be classified as employees and the subordinated lodge itself classified as an employer. This consideration, of course, excludes the issue of the orchestra, and to a degree, that of the Aerie Physician. A determination of this issue, however, becomes important on the question as to whether or not there were eight or more regular employees, as required by law.

Under the stipulations on file herein, and by the admissions of the pleadings and the proof offered at the time of trial, it is clear that all of those involved in the tax leavy in the Aberdeen and Ballard Cases fall within the class above enumerated; that is, they are all officers of the subordinate Aeries that are strictly and primarily fraternal organizations, having over them a Grand Aerie that provides the Constitution for such subordinate Aeries, and expressly outlines the duties and responsibilities of the elected and appointed officers in connection with the ritualistic work of this fraternal organization. An [64] examination of the Constitution, under which each of the subordinate Aeries here involved operates, readily establishes the fact that it is in no sense a

commercial or profit making corporation, and that the sums given to the officers are not intended to be financial remunerations for services, but, at most, would have to be classified as mere honorariums.

Being an officer of a subordinate Aerie is a distinction and honor conferred upon the individual by his fellow members, because of ability, faithfulness in observing ritualistic requirements, and a demonstrated belief in the objectives of the fraternity. There is no assured tenure of service beyond the limit of time fixed by the constitution, and the service, under no stretch of imagination, can be considered as a means of procuring a livelihood, or being made the basis for the payment of unemployment compensation. It seems to me that it has required a strict and even strained construction of both the Act and the regulations to bring the officers of these subordinate Aeries within the provisions thereof. I hold, therefore, that all of the officers of these subordinate Aeries are ritualistic officers, and as such are not included within the terms and provisions of Titles VIII and IX of the Social Security Act of 1935, 42 U.S.C.A.

The musician employed by the Ballard Aerie, who received a compensation of $2.50 per meeting, is not a ritualistic officer, as provided by the constitution, and, at first blush, it might appear that he should be included under the provisions of the Act, but an analysis of the service that he performs, being for a period of an hour or two each week, and a requirement that he be a member of the fraternity, readily establishes the fact that his services are

casual and incidental insofar as the fraternity is concerned, and would be exempt under the provisions of [65] Title VIII, Sec. 811(b)(3) Social Security Act, 1935.

I have already found that the Aerie Physician is a ritualistic officer, and that, of itself, would exempt him from inclusion herein, but he would likewise have to be excluded as an employee under the accepted definition of that term, because it is admitted that his services, aside from his ritualistic duties, are purely professional, and are rendered entirely exclusive of any control being exercised by the subordinate Aerie; every detail of the professional services rendered by the Physician to the members of the fraternity or their families, is wholly within the exercise of discretion by the Physician, and the relationship of physician and patient is clearly established when a member of the fraternity or his family accepts the services of the physician. The responsibilities and immunities that go with that relationship exist in all instances in the treatment supplied by the Physician to the patient. His status becomes that of any other private physician. The Physician must, therefore, be considered as excluded from the provisions of the Act here involved upon the ground: first, that he is a ritualistic officer; second, that his services are purely professional and excluded by Departmental Regulation; and, third, that he is an independent contractor.

We come now to the last issue involved herein, and that is the employment of an orchestra by the Seattle Aerie.

I shall not endeavor to enumerate all of the elements that exist here, but the undisputed facts and admissions clearly establish the contention of the plaintiff that the orchestras, during the years here involved, supplied music through an independent contractor. *Is* is enough to say that the Aerie itself:

1. Exercised no right to direct the performance of any [66] individual member of the orchestra.
2. Had nothing to do with the selection of any individual member.
3. Was under no legal obligation to pay any wage or salary to any individual member.
4. Could not discharge any individual member.
5. Did not even direct the type of music to be played nor furnish such music.
6. Did not furnish any of the instruments, aside from a piano.

The facts further disclose that:

1. The orchestra operated under the name of its leader.
2. Its services were contracted for with the leader.
3. All payment for such services was made to the leader.

The leader was not an employee of the Seattle Aerie, but his status was quite clearly that of an independent contractor, and I so find.

The case of Williams vs. U. S., 126 Fed. 2nd 129, is decisive of this issue. This case comes from the Seventh Circuit, and reverses the lower court in its decision. The principle announced in this case has

been approved in this Circuit, the Ninth, in the case of Anglin vs. Empire Star Mines Co., 129 Fed. 2nd 914, and these decisions are binding upon this Court upon this issue, and make the law of this case. The facts in the Williams case, supporting the contention that he was an independent contractor, are not nearly so strong as in the case at bar, because there the services were being performed for the use and benefit of strictly commercial organizations, as distinguished from a fraternal organization here.

It was said in the Williams case supra:

> "We think the record discloses without ques-
> [67] tion that the right to hire and discharge was the sole prerogative of the plaintiff".

In this case that right vested solely in the leader of the orchestra and not in the Seattle Aerie. The Treasury regulations under which these assessments are made, Art. 3, Reg. 91, provide:

> "In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work, and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not, as to such services, an employee".

The record as made in this case clearly brings the orchestra that furnished music to the Seattle Aerie within this definition.

The government makes much of the contention that the union scale was the standard by which com-

pensation was paid to the orchestra, the leader receiving ten per cent more than the individual employees. That was established in this case, but, of itself, it can not be the controlling factor in the establishment of the relationship of employer and employee.

I have endeavored to cover the issues that have been raised in this group of cases as fully as is necessary to permit the preparation and submission of findings of fact and *and* conclusions of law and a decree, and I have refrained from citation of numerous authorities or an analysis of the many authorities that have been presented in the course of the trial, because it would unduly extend this opinion, and serve no useful purpose to either of the parties involved.

Dated at Tacoma, Washington, this 9th day of July, 1943.

/s/ CHARLES H. LEAVY
United States District Judge.

[Endorsed]: Filed July 10, 1943. [68]

In the District Court of the United States for the Western District of Washington, Southern Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., and from the evidence introduced by both parties the Court makes the following

FINDINGS OF FACT

I.

This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes assessed and collected under Title VIII of

the Social Security Act of the United States and subchapter A of Chapter IX of the Internal Revenue Code (Federal Insurance Contributions Act, as amended by Social Security Act Amendments of 1939).

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington relating to Fraternal corporations and has paid all license fees now due [69] and owing by it to operate a fraternal corporation in the State of Washington, and maintains its club premises at Aberdeen, Washington.

IV.

The plaintiff filed original and supplemental quarterly returns for 1938, and paid taxes thereon of $53.08. The original and supplemental quarterly returns were filed for 1939 on which a tax was paid of $59.02, and for 1940, on which a tax was paid of $57.84. Plaintiff also filed a quarterly return for the period January 1, 1941, through September 30, 1941, on which a tax was paid of $47.51.

On January 23, 1942, plaintiff filed separate claims for refund on Form 843, as follows: For the year 1938 in the amount of $19.24; for the year 1939 in the amount of $22.81; for the year 1940 in the amount of $19.20, and for the period of Jan-

uary 1, 1941, through September 30, 1941, in the amount of $8.86. The claims for refund are based on the plaintiff's contention that its Aerie physician and certain of its officers are not employees for the purpose of the Social Security Act, and more particularly alleges as follows:

Year 1938

1. Tax was erroneously assessed on our doctor, trustees, and ritualistic officers.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. His S. S. No. and name is: 534-18-9612, Dr. E. B. Riley.
3. C. B. 1937-1, 462; C. B. 1937-2, 403 and C. B. 1939-2, 295.
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those erroneously assessed as above are: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Charles Martin, John Woodcock, Luther Brownrigg, Vernon Bagley, Harry I. Tucker, Caleb Merritt. [70]
5. No part of the above tax was paid by the so-called employees.

Year 1939

1. Tax was erroneously assessed on doctors, ritualistic officers, and trustees.

2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. Dr. E. B. Riley, 534-18-9612.
3. C. B. 1937-1, 462; C. B. 1937-2, 403 & 448; C. B. 1939-2, 295.
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those so erroneously assessed are as follows: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Charles Martin, Milton Jones, Roy Sims, H. E. West.
5. No part of the above tax was paid by the so-called employees.

Year 1940

1. Tax was erroneously assessed on our doctor elected by our members on a contract basis to render the sick and health benefits of our lodge. Sec: C. B. 1937-1, 462; C. B. 1937-2, 403; C. B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.

3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so we would be discriminated against if we are not given the exemption.
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.
5. No part of the above tax was paid by the so-called employees.

Period January 1, 1941, to
September 30, 1941.

1. Tax was erroneously paid on our doctor elected by our members on a contract basis [71] to render the sick and health benefits of our lodge. See C. B. 1937-1, 462; C. B. 1937-2, 403; C. B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.
3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so would be discriminated against if we are not given the exemption.
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.

V.

The Commissioner of Internal Revenue, by a letter dated October 1, 1942, disallowed plaintiff's four claims for refund. The present action was timely filed on November 15, 1942.

VI.

That from 1938 to September 30, 1941, the plaintiff had certain essential and required officers of its subordinate Aerie as provided for by the Grand Aerie Constitution, namely: an Aerie physician, President, Vice President, Treasurer, Trustees and members of an Auditing Committee. The duties of these various officers are enumerated in detail in the Grand Aerie Constitution. The compensation that they are to receive is in some instances fixed by the constitution and in others fixed by this Aerie.

VII.

That the compensation of these officers, with the exception of the Aerie physician and the Secretary, is nominal but as low as 33 1/3c per month for the Worthy President and the Worthy Vice President and a number of other officers of the plaintiff Aerie who are either elective or appointive receive a compensation of $1.00 per month.

VIII.

That the Aerie physician, the President and Vice President, [72] Treasurer, Trustees and members of the Auditing Committee are officers of the plaintiff Aerie which is strictly and primarily a Fraternal Organization.

IX.

That the plaintiff Aerie is not a commercial or profit-making corporation.

X.

That all of the officers of the plaintiff's subordinate Aerie are ritualistic officers.

XI.

That the Aerie physician involved is a ritualistic officer. His services are purely professional and the services rendered by him are wholly within the exercise of the discretion of the physician and rendered entirely exclusive of any control on the part of the plaintiff Aerie.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY,
Judge.

And from the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That all of the officers of the plaintiff's subordinate Aerie are ritualistic officers and as such are not included within the terms and provisions of Titles VIII and IX of the Social Security Act of 1935.

II.

That the Aerie physician is a ritualistic officer and an independent contractor and is not an employee of the plaintiff Aerie and must be con-

sidered excluded from the provisions of the Social Security Act. [73]

III.

Judgment is hereby entered for the plaintiff against the defendant in the sum of $74.22, with interest from date as provided by law, and with costs and disbursements herein to be taxed by the Clerk of this Court.

Done in Open Court this 14th day of September, 1943.

CHARLES H. LEAVY,
Judge.

Presented by:

CORNELIUS C. CHAVELLE,
Of Chavelle & Chavelle, Attorneys for Plaintiff.

Approved by:

THOMAS R. WINTER,
Attorney for Defendant.

[Endorsed]: Filed Sept. 14, 1943. [74]

In the District Court of the United States for the Western District of Washington, Southern Division

Civil Action

File No. 510

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., and from the evidence introduced by both parties the Court makes the following

FINDINGS OF FACT

I.

This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes assessed and collected under Title IX. of the Social Security Act of the United States and

also under subchapter C entitled "Tax on Employers of Eight or More" of Title 26 Section 1600 of the United States Code and also known as Federal Unemployment Tax Act.

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington relating to [75] Fraternal Corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington.

IV.

On January 17, 1941, plaintiff filed its annual returns under Title IX of the Social Security Act for the periods indicated and on March 4, 1941, paid taxes with respect thereto as follows:

1936	$ 18.68
1937	98.44
1938	393.82
1939	310.79

On July 16, 1941, plaintiff filed claims for refund of the amounts of tax above indicated on the ground that during these years it was not an employer of eight or more individuals and consequently not subject to this tax. Certified copies of such claims are attached hereto, marked Exhibits A, B, C and D, respectively, and made a part hereof. These claims

for refund, with respect to 1936, 1938 and 1939, were denied on September 6, 1941. The claim for refund with respect to 1937 was denied on March 25, 1942.

V.

Pursuant to a certificate of overassessment, on or about April 15, 1942, there was refunded to the plaintiff $232.92 with respect to its taxes for 1938, and $157.70 with respect to its taxes for 1939, being credits allowable for contributions paid by the plaintiff to the State of Washington. The result of these refunds was to reduce the net amount of taxes paid by the plaintiff for 1938 to $160.90, and that paid for 1939 to $153.09.

VI.

The present action was commenced on or about November 4, 1942, by the plaintiff for the recovery of the following amounts, relative to the taxable periods indicated: [76]

1936	$ 18.68
1937	98.44
1938	160.91
1939	153.08

VII.

That from 1936 to 1940 the plaintiff had certain essential and required officers of its subordinate Aerie as provided for by the Grand Aerie Constitution, namely: Aerie physicians, Treasurer, Trustees, and a musician and others not in issue herein. The duties of these various officers are enumerated

in detail in the Grand Aerie Constitution. The compensation they are to receive is fixed by the Constitution for subordinate Aeries.

VIII.

That the compensation these officers receive is nominal and is low as 33 1/3c per month in some instances and a number of other officers of the plaintiff Aerie who are in some instances elective and others appointive receive a compensation of $1.00 per month.

IX.

That the musician is appointed by the Worthy President and receives a compensation of $2.50 per meeting. The services that he performs require an hour or two each week and he is required to be a member of the plaintiff organization, and further, the services that the musician renders are casual and incidental.

X.

That the Aerie physicians, the Treasurer and the Trustees of the plaintiff Aerie are officers of said Aerie which is strictly and primarily a fraternal organization.

XI.

That the plaintiff Aerie is not a commercial or profit-making corporation.

XII.

That the individuals involved herein, with the exception [77] of the musician, are ritualistic officers of the plaintiff Aerie and their duties are pre-

scribed in the Constitution for subordinate Aeries which is promulgated by the Grand Aerie of the Fraternal Order of Eagles.

XIII.

That the Aerie physicians involved are ritualistic officers and the services rendered by them are purely professional and are wholly within the exercise of the discretion of the physicians and are rendered entirely exclusive of any control on the part of the plaintiff Aerie.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY,
Judge.

And from the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That all of the officers of the plaintiff's subordinate Aerie are ritualistic officers and as such are not included within the terms and provisions of Title VIII and IX of the Social Security Act of 1935.

II.

That the Aerie physicians are ritualistic officers and independent contractors and are not employees of the plaintiff Aerie and must be considered excluded from the terms and provisions of the Social Security Act.

III.

That the Aerie musician is not the employee under provisions of Titles VIII and IX of the Social Security Act of 1935. [78]

IV.

Judgment is hereby entered for the plaintiff against the defendant in the sum of $431.11, with interest from date as provided by law, and with costs and disbursements herein to be taxed by the Clerk of this Court.

Done in Open Court this 14th day of September, 1943.

CHARLES H. LEAVY,
Judge.

Presented by:

CORNELIUS C. CHAVELLE,
Of Chavelle & Chavelle, Attorneys for Plaintiff.

Approved by:

THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 14, 1943. [79]

In the District Court of the United States for the Western District of Washington, Southern Division

Civil Action

File No. 510

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

DECREE

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., Special Representative to the General Counsel of the Bureau of Internal Revenue, whereupon witnesses on the part of the plaintiff were duly sworn and examined and documentary evidence introduced by the respective parties and the evidence being closed the cause was submitted to the Court for consideration and decision and after deliberation thereon the Court caused to be filed its written opinion whereby a judgment was

Ordered that the Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, do have

and recover of and from the defendant, United States of America, the sum of $431.11, together with interest from date as provided by law and plaintiff's costs and disbursements herein to be taxed.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY,
Judge.

Presented by:

CORNELIUS C. CHAVELLE,
Of Chavelle & Chavelle, Attorneys for Plaintiff.

Approved by:

THOMAS R. WINTER,
Attorney for Defendant.

[Endorsed]: Filed Sept. 14, 1943. [80]

In the District Court of the United States for the western District of Washington, Southern Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

DECREE

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., Special Representative to the General Counsel of the Bureau of Internal Revenue, whereupon witnesses on the part of the plaintiff were duly sworn and examined and documentary evidence introduced by the respective parties and the evidence being closed the cause was submitted to the Court for consideration and decision and after deliberation thereon the Court caused to be filed its written opinion whereby a judgment was

Ordered that the Aberdeen Aerie No. 24 of the

Fraternal Order of Eagles, a corporation, do have and recover of and from the defendant, United States of America, the sum of $74.22, together with interest from date as provided by law and plaintiff's costs and disbursements herein to be taxed.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY
Judge [81]

Presented by:

CORNELIUS C. CHAVELLE
Of Chavelle & Chavelle
Attorneys for Plaintiff

Approved by:

THOMAS R. WINTER
Attorney for Defendant

[Endorsed]: Filed Sept. 14, 1943. [82]

In the District Court of the United States for the Western District of Washington, Southern Division

Civil No. 510

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF FACTS

The parties to the above entitled action, by their respective attorneys, stipulate that for the purpose of this action the facts stated herein may be accepted as true, admitted in evidence, and made a part of the record, and said parties further agree as follows:

1.

During 1936 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationship to plaintiff is conceded to have been that of employees for purposes of Title IX of the Social Security Act.

2.

During 1936 the only individuals whose relationship to plaintiff as employees is in issue in this action are: two physicians, one musician and one treasurer.

3.

During 1937 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationships to plaintiff is conceded to have been that of employees for purposes of Title IX of the Social Security Act. [83]

4.

During 1937 the only individuals whose relationship to plaintiff as employees is in issue in this action are: three physicians and one musician.

5.

During 1938 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationship to plaintiff is conceded to have been that of employees for purposes to Title IX of the Social Security Act.

6.

During 1938 the only individuals whose relationship to plaintiff as employees is in issue in this action are: two physicians, one musician, and one treasurer.

7.

During 1939 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationship to plaintiff is conceded to have been that of employees for purposes of Title IX of the Social Security Act.

8.

During 1939 the only individuals whose relationship to plaintiff as employees is in issue in this action are: two physicians, one musician, and one treasurer.

9.

If any or all of the individuals whose relationship to plaintiff as employees in issue are determined to be employees of plaintiff, it is conceded that such individuals were employees for purposes of Title IX of the Social Security Act. [84]

10.

The parties hereto agree that the findings of fact and conclusions of law adopted by the District Court in this action on September 14, 1943 may be revised so as to set forth the contents of this stipulation.

Dated this 10th day of December, 1943.

S/ CORNELIUS C. CHAVELLE
Attorney for Ballard Aerie

S/ J. CHARLES DENNIS
United States Attorney

Copy received this 10th day of Dec. 1943.

CHAVELLE & CHAVELLE
S/ CORNELIUS C. CHAVELLE
By RRM

[Endorsed]: Filed Dec. 11, 1943. [84a]

[Title of District Court and Cause.]

No. 510

ORDER

It appearing to the court that the parties to this action have stipulated in writing as to certain facts concerning the issues involved in this cause, and further that said stipulation may be admitted in evidence and made a part of the record, and the court having considered the matter, it is,

Ordered that the stipulation of the parties herein dated December 10, 1943 be and the same hereby is admitted in evidence in this cause and made a part of the record herein and that the Findings of Fact and Conclusions of Law heretofore entered in this cause shall be considered, amended and revised so as to include the matter set forth in said stipulation.

Done in Open Court this 11th day of December, 1943.

S/ CHARLES H. LEAVY
United States District Judge

Presented by:

S/ HARRY SAGER
Assistant U. S. Attorney

[Endorsed]: Filed Dec. 11, 1943. [85]

United States District Court
Western District of Washington
Southern Division

No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled case entered on September 14, 1943, awarding judgment against the defendant, and on behalf of the plaintiff in the sum of $74.22, together with interest from date and plaintiff's costs and disbursements to be taxed.

Dated this 10th day of December, 1943.

S/ J. CHARLES DENNIS
United States Attorney

S/ HARRY SAGER
Assistant United States Attorney

S/ THOMAS R. WINTER
General Counsel Representative

Copy mailed to Cornelius C. Chavelle, Attorney for Plaintiff this 10th day of December, 1943.

S/ E. REDMAYNE,
Dep. Clerk

[Endorsed]: Filed Dec. 10, 1943. [86]

United States District Court
Western District of Washington
Southern Division

No. 510

BALLARD AERIE #172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled case entered on September 14, 1943, awarding judgment against the defendant, and on behalf of the plaintiff in the sum of $431.11, together with interest from date and plaintiff's costs and disbursements to be taxed.

Dated this 10th day of December, 1943.

S/ J. CHARLES DENNIS
United States Attorney

S/ HARRY SAGER
Assistant United States Attorney

S/ THOMAS R. WINTER
General Counsel Representative

Copy mailed to Cornelius C. Chavelle, Attorney for Plaintiff this 10th day of December, 1943.

S/ E. REDMAYNE,
Dep. Clerk

[Endorsed]: Filed Dec. 10, 1943. [87]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER EXTENDING TIME TO DOCKET APPEAL

It is ordered that the time within which to docket the record on appeal is hereby extended to and including March 9, 1944.

Done in open court this 17th day of January, 1944.

CHARLES H. LEAVY
United States District Judge

Presented by:

THOMAS R. WINTER
Attorney for Defendant

Approved:

CORNELIUS C. CHAVELLE
Attorney for Plaintiff

[Endorsed]: Filed Jan. 17, 1944. [88]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 510

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER EXTENDING TIME TO DOCKET APPEAL

It is ordered that the time within which to docket the record on appeal is hereby extended to and including March 9, 1944.

Done in open court this 17th day of January, 1944.

CHARLES H. LEAVY
United States District Judge

Presented by:

THOMAS R. WINTER
Attorney for Defendant

Approved:

CORNELIUS C. CHAVELLE
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 17, 1944. [89]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 459

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

No. 510 Tacoma

No. 608 Seattle

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER RE EXHIBITS

Upon application of the attorney for the defendant and appellant in the above-entitled causes, and good cause appearing therefor, it is hereby

Ordered that all original exhibits in these causes be certified and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in connection with the appeals of these cases.

Dated this 29th day of Jan., 1944.

CHARLES H. LEAVY
Judge

Presented by

HARRY SAGER
Asst. U. S. Atty.
THOMAS R. WINTER

Approved as to form

CORNELIUS C. CHAVELLE
Attorney for Plaintiffs

[Endorsed]: Filed Jan. 29, 1944. [90]

[Title of District Court and Causes.]

STIPULATION DESIGNATING CONTENTS OF RECORD ON APPEALS

To the Clerk of the above Court:

The above-entitled causes, together with Seattle Aerie No. 1 of the Fraternal Order of Eagles, a corporation, plaintiff, v. Clark Squire, Collector of Internal Revenue of the United States of America, defendant, Cause No. 466, having been consolidated for trial, the plaintiffs and the defendant, through their respective attorneys, now hereby stipulate that the cases be consolidated on appeal for the purpose of record, argument, briefing, opinion and judgment, and do hereby designate as necessary for the consideration of these appeals the following to be contained in the record on appeals;

1. Complaints in both causes, Nos, 459 and 510.

2. Answer and amended answer in Cause Nos. 459 and 510, respectively. [91]

3. Stipulation filed May 25, 1943, in Cause No. 459, and Stipulation filed May 26, 1943, in Cause No. 510.

4. Opinion filed July 10, 1943.

5. Findings of Fact and Conclusions of Law filed in Cause Nos. 459 and 510.

6. Stipulation of Facts, filed December 11, 1943, in Cause No. 510.

7. Order filed December 11, 1943, in Cause No. 510.

8. Decrees filed in Cause Nos. 459 and 510.

9. Notices of Appeal filed in Cause Nos. 459 and 510.

10. Orders Extending Time, filed January 17, 1944, in Cause Nos. 459 and 510.

11. Reporter's original transcript, Volumes 1 and 2, except that there be deleted from the certification all material beginning at Line 24 on page 6, to and including Line 11 on page 42, in Volume 2 of the transcript, which has reference solely to the case of Seattle Aerie No. 1 of the Fraternal Order of Eagles, a corporation, v. Clark Squire, Collector of Internal Revenue of the United States of America, the appeal in which has been dismissed by agreement.

12. All exhibits in Cause Nos. 459 and 510 to be certified in their original form.

13. Order Re Exhibits.

14. This Designation of Contents of Record on Appeals.

Dated this 24th day of January, 1944.

(Sgd.) J. CHAS. DENNIS
United States Attorney

(Sgd.) HARRY SAGER
Assistant United States Attorney

(Sgd.) THOMAS R. WINTER
Assistant to the Chief Counsel, Bureau of Internal Revenue.

Attorneys for Defendant.

(Sgd.) CORNELIUS C. CHAVELLE
Attorney for Plaintiffs. [92]

[Title of District Court and Causes.]

CLERK'S CERTIFICATE

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 92, inclusive, is a full, true and correct copy of so much of the records, papers and proceedings in Cause 459, Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, a corporation, Plaintiff and Appellee, vs. United States of America, Defendant and Appellant, and in Cause No. 510, Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, Plaintiff and Appellee, vs. United States of America, Defendant and Appellant, as required by the Stipula-

tion of the parties herein designating the contents of the consolidating record on appeal, the original of which is on file and of record in my office at Tacoma, Washington, the same constituting the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western [93] District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Reporter's Transcript of Evidence (Volumes I and II), is transmitted herewith, except that pursuant to Item 11 of the Stipulation Designating the Contents of the Record on Appeal, there be deleted from certification on appeal all material beginning at Line 24 of Page 6 to and including Line 11 of Page 42 in Volume II of said Reporter's Transcript of Evidence, said pages having reference solely to a case the appeal in which has been dismissed by agreement.

I further certify that the original State of Points to be Relied Upon and the original Stipulation for Designation of Record for Printing, in each of the above-captioned cases, are transmitted herewith.

I further certify that Plaintiff's original exhibits, numbered 1 to 7, inclusive, in Cause 459, and numbered 1 to 4, inclusive, in Cause No. 510, are transmitted herewith.

I further certify that the following is a full, true and correct statement of the Clerk's fees and charges incurred on behalf of the Defendant-Appellant in the preparation and certification of the

Transcript of the Record on Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee, Cause 459	$ 5.00
Appeal fee, Cause 510	5.00
To preparing and comparing Transcript on Appeal, 264 folios @ 5c per folio	13.20
Clerk's certificate	.50
	$23.70

[94]

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, Washington, this 10th day of February, 1944.

[Seal] JUDSON W. SHORETT,
Clerk
By E. E. REDMAYNE
Deputy [95]

In the District Court of the United States, for the Western District of Washington, Southern Division

Civil Action
File No. 459

(Consolidated with 466 & 510)

ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, A Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Be It Remembered, That this cause came regularly on for hearing before the Hon. Charles H. Leavy, Judge of the above-entitled court, at Tacoma, Washington, on May 25, 1943.

Appearances:

For the Plaintiff,
Mr. Cornelius Chavelle of Messrs. Chavelle & Chavelle

For the Defendant,
Mr. Thomas R. Winter, Special Assistant to the Chief Counsel.

Both sides having announced themselves ready for trial, the following proceedings were had: [3*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

DR. EDWARD B. RILEY,

A witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your name, please?

A. Edward B. Riley.

Q. Where do you reside? A. Aberdeen.

Q. What is your occupation?

A. Physician.

Q. Just how long have you been a physician, Doctor? A. Thirty-three years.

Q. And at all times in the city of Aberdeen?

A. Yes, sir.

Q. Have you had some connection with Aberdeen Aerie No. 24 Fraternal Order of Eagles in the past few years? A. Yes, sir.

Q. In what capacity? A. Aerie physician.

Q. When did you become physician?

A. January, 1917.

Q. Doctor, ever since that time have you been the Aerie physician for Aberdeen Aerie?

A. I have.

Q. Did they have any other Aerie physician outside of yourself?

A. Yes, sir; at one time many years ago there was a [4] second physician, at the time I was appointed.

Q. Doctor, will you state how you became an aerie physician?

A. By election of the membership of the aerie.

(Testimony of Dr. Edward B. Riley.)

Q. Doctor, did some one contact you prior to your election or not? A. No, sir.

Q. Where is your office, Doctor, in Aberdeen?

A. The Finch Building.

Q. How long have you been in the Finch Building?

A. Since about the day it was opened, April 1, 1910.

Q. (By the Court): Let me ask you right there: How can you lose your position with the aerie, Doctor? Who can discharge you?

A. I can be discharged by filing a hearing for failure to properly conduct my duties.

Q. A charge can be filed on the part of the membership or the Board of Trustees?

A. Any person, any member, who might become dissatisfied with my services could have reason, if he so desired, to bring a charge against me on account of what he might consider improper services, and then those charges would be presented to the Worthy President, and he would instruct them that a hearing be held with the officers of the aerie.

Q. (By Mr. Chavelle): Then would the members have a vote on that? A. Yes.

Q. Doctor, in other words, you can't be summarily discharged?

A. That is correct. [5]

Q. Do you employ any assistants in your office?

A. No, sir.

Q. Who pays the rent for your office, Doctor?

A. I pay it.

(Testimony of Dr. Edward B. Riley.)

Q. Does the Fraternal Order of Eagles contribute towards the payment of your rent?

A. No, sir.

Q. Now, will you explain, Doctor, the basis of your remuneration?

A. I am paid 50 cents per member per quarter for all members in good standing during the previous quarter. In other words, I am paid in the month of April, and July, October and January 50 cents per quarter for members in good standing during the previous quarter.

Q. In other words, Doctor, if there were a thousand members belonging to Aberdeen Aerie No. 24 and they were all in good standing, your remuneration is based upon 1000 members at 50 cents a member? Is that correct?

A. That is correct, for three months.

Mr. Winter: I object to what might be as immaterial, as far as this case is concerned.

The Court: Let's proceed.

Q. (By Mr. Chavelle): Now, Doctor, during the period of 1938-'39 were you employed by Aberdeen Aerie No. 24 of the Fraternal Order of Eagles as Aerie physician?

A. I was Aerie physician in Aberdeen Aerie No. 24 of the Fraternal Order of Eagles during those years.

Q. In 1939 and 1940 were you the Aerie Physician for Aberdeen Aerie No. 24, Fraternal Order of Eagles? A. I was. [6]

Q. And in 1940 to September 30th were you the Aerie's physician? A. I was.

(Testimony of Dr. Edward B. Riley.)

The Court: That is September 30th of what year?

Q. (By Mr. Chavelle): September 30th, 1941?

A. That is correct.

Q. From January 1, 1941 to September 30, 1941, were you the Aerie's Physician for Aberdeen Aerie No. 24? A. I was.

Q. And are you at the present time the Aerie Physician? A. I am.

Q. Now, Doctor, can you state whether or not Aberdeen Aerie No. 24 Fraternal Order of Eagles furnishes the equipment that you use to furnish service to the members?

A. Nothing whatever

Q. Do they furnish the medicine which you prescribe? A. No, sir.

Q. Will you state, Doctor, whether or not the membership of Aberdeen Aerie has a prevailing call upon your time?

A. No, sir; they do not.

Q. Are you required by Aberdeen Aerie to give preference to members of the Fraternal Order of Eagles, over your regular patients?

A. No, sir; I am not.

Mr. Winter: I object to it on the ground that it does not appear whether or not the employment is under any contract or whether it is oral. We think it is necessary that that be shown.

Mr. Chavelle: It will be shown, your Honor.

The Court: Objection overruled. Proceed. [7]

(Testimony of Dr. Edward B. Riley.)

Mr. Winter: May I ask a question on voir dire, your Honor?

The Court: I think you can very easily cover this when you take him on cross.

Q. You may answer the question.

A. What is the question?

(Question read.)

A. No, sir.

Q. In rendering medical services to the members of the Fraternal Order of Eagles, where do you generally render that service?

A. In their homes, in my office or at one of the hospitals.

Q. Do you work regularly for Aberdeen Aerie as the Aerie Physician?

A. I render the service to the members that I am called upon to render, in accordance with the constitution.

Q. Are you allowed to engage in other work?

A. Yes, sir.

Q. Do you engage in other work?

A. Yes, sir. My work for the Aberdeen Aerie, Fraternal Order of Eagles is a comparatively small percentage of my general practice.

Q. Are you required to be available at all times, Doctor? A. No, sir.

Q. Would you state whether or not the Aberdeen Aerie No. 24 directs you in any way as to the manner or method you utilize in treating the members of the Aerie that submit themselves to you for treatment?

(Testimony of Dr. Edward B. Riley.)

A. No, sir; Aberdeen Aerie No. 24 has no jurisdiction [8] or no say or no direction whatever in the way the members are treated by me. These members are treated by me just the same as patients in my private practice.

Q. In other words, you use your own discrimination, Doctor? A. Absolutely.

Q. Are you told how to treat the various members? A. No, sir.

Q. Under the Aerie constitution, are you required to submit reports to the secretary or to the Aerie?

Mr. Winter: We submit, if the Court please, that the constitution is the best evidence of what he is required to do under it.

The Court: That is true, I suppose; but I think we can probably shorten this by letting him finish.

A. I render a report to the secretary or some other officer, usually the secretary. That is, I report the members who become ill and come under my care from time to time. I report the beginning and the termination of their disability.

Q. For what purpose, Doctor?

A. In order that they may draw their weekly sick benefits. That applies, however, only to the members themselves and not to the members of the family, necessarily.

Q. Are you restricted to the type of cases which you shall treat?

A. My services are not required for obstetrical work or anything pertaining thereto, or for venerial

(Testimony of Dr. Edward B. Riley.)

diseases nor chronic diseases which may have existed when the member became a member of the Aerie, nor for any condition resulting [9] from intoxication or violation of law or city ordinances.

Q. What type of cases do you treat, Doctor?

A. All medical cases except the ones that I have stated in the previous answer as exceptions; all minor surgical work; all uncomplicated fractured rib cases; all acute illness involving the member or any member of his family, including children up to 18 years of age, or any person depending upon the member for support; any minor amputating, such as fingers and toes; house calls for ordinary sickness, office calls for ordinary diseases; for illnesses which are not house-confining or hospital patients,—diseases of that nature. In a general way, we are not required to perform major surgery, nor am I required to treat fractures which necessitate the use of X-ray equipment before and after reduction.

Q. Doctor, may you terminate your services at any time? A. I may.

Q. Does Aberdeen Aerie direct you as to what medicines shall be prescribed to individuals you might treat?

A. No, sir; not in any way whatever.

Q. Or as to the method or manner in which you perform your services?

A. No, sir. Those things are all left to my discrimination, just the same as the treatment of patients in private practice.

(Testimony of Dr. Edward B. Riley.)

Q. Do you operate under your own name, Doctor? A. Yes, sir.

Q. Does Aberdeen Aerie furnish any furniture of telephone service?

A. Nothing whatever. Aberdeen Aerie does not contribute in any way whatever to any of my professional expenses pertaining to equipment or otherwise, not a penny. [10]

Q. Are you directed by Aberdeen Aerie when to perform a minor surgical operation?

A. No, sir.

Q. Is it up to your discrimination whether you shall operate? A. That is up to my judgment.

Q. Are you elected every year?

A. Yes, sir.

Q. Do you attend meetings?

A. Yes, sir, insofar as possible.

Q. Are you compelled to attend meetings

A. No, sir.

Q. Is there any penalty involved if you do not attend meetings? A. No, sir.

Q. Do you ever have occasion to call in an assistant doctor in any of the cases?

A. Well, I have done so, but it hasn't been for a long time.

Q. In the event that you did, who has the appointment, yourself or the Aberdeen Aerie?

A. The patient.

Q. Under the services that you render, has the Aberdeen Aerie power to restrict your territory,

(Testimony of Dr. Edward B. Riley.)

whom you take or what the situation is as to territorial limits?

A. The territory is limited, generally speaking, to the corporate limits of the city of Aberdeen, other than the fact that the little town of Cosmopolis adjoins South Aberdeen, and we have a few members over there, and they are taken care of the same as members in the city of Aberdeen. [11]

Q. Are you required, Doctor, to maintain an assistant in your office? A. No, sir.

Q. Or telephone service? A. No, sir.

Mr. Chavelle: I think that is all, your Honor.

Cross Examination

By Mr. Winter:

Q. You are an officer of the Lodge, are you not, under the constitution? A. I believe so.

Q. And you are so elected?

A. I am elected at the time of the election of the other officers of the Lodge.

Q. And you also attend meetings whenever you can, you say?

A. I usually attend the meetings, yes, sir.

Q. As Aerie physician, you understand you are elected to perform that office entirely under the constitution? Is that right, of the subordinate aerie?

A. Well, naturally, I am guided by the constitution. I use my judgment, of course, too.

Q. In the operations you perform?

A. In performing my professional duties, the same as I would in private practice.

(Testimony of Dr. Edward B. Riley.)

Q. Insofar as any contract you have with the aerie, the terms are prescribed by the constitution? Is that right?

A. No, sir; I wouldn't consider it so.

Q. However, you understand that the aerie can insist that you perform all the duties which are required under the [12] constitution? You understand that?

A. Well, the constitution differentiates between minor surgical work and major surgical work, for example.

Q. I understand, but it also provides what you shall do for the consideration of the 50 cents per member. Isn't that true?

A. Well, the constitution directs, in a way, what is required of the aerie physician.

Q. Yes, but the aerie physician——

A. (Interrupting): As far as these limitation are concerned.

Q. And they couldn't require you to do anything more than what is required in that, if you wanted to insist on the letter of the law, they couldn't insist that you do any more than is provided in the constitution. Is that right?

A. Well, if I did not do what was considered reasonable, as far as the patient was concerned, or the member was concerned, why, I wouldn't feel that I was carrying out my professional duties as a physician.

Q. Under the constitution, you are required to attend all meetings and to make a report of the

(Testimony of Dr. Edward B. Riley.)

sick, or any matter concerning all sick members under your care. Isn't that true? I am referring to Section 7 of article 15.

A. I think there is a statement to that effect in the constitution. However, there are a great many aerie physicians, or fraternal orders, the doctors that voluntarily never attend the meetings. That is entirely optional, as far as that is concerned, as the practice is carried out.

Q. But there is no such provision in the constitution that it is optional, is there? [13]

A. I think the wording possibly reads, "Whereever possible", or words to that effect.

Q. Now, you say that your services as aerie physician may be terminated by a vote of the members. Is that true?

A. The constitution, I think, provides, as I stated before, that if any member has a grievance as far as my services are concerned, he has the privilege of filing a complaint in writing with the worthy president of the aerie, who in turn shall take the grievance up with the officers, at which the aerie physician shall be invited to be present and state the circumstances, and so forth, and in the event that the relief committee or the officers comprising the relief committee, decide that the grievance is a willful grievance, then by vote of the aerie, an aerie physician can be removed from office.

Q. Is that the only cause upon which the aerie physician may be removed? I will put it this way: Isn't it a fact, if the general fund does not work

(Testimony of Dr. Edward B. Riley.)

out, as a matter of fact you can be removed under Section 2, Article 1?

A. Well, if the money isn't there to pay a physician, of course they are not going to elect him.

Q. Well, but after he is elected, if the general fund——

A. (Interrupting): Well, that is so far from professional services,—Well, yes, there is a provision in the constitution to that effect, and that——

Q. (Interrupting): That they can terminate your services?

A. Any man can quit his job if he isn't being paid for it, naturally.

Q. That provides that the Lodge may terminate your services if the general fund does not warrant it? [14]

A. Naturally, they wouldn't do it if they did not have the funds to pay for the services.

Q. You say you maintain your own telephone service? A. I do.

Q. And you maintain office hours?

A. I do.

Q. But isn't it also a fact that under Section 8, Article 15 it provides that the aerie physician shall maintain telephone service and regular office hours and shall advise the secretary accordingly? Did you advise the secretary accordingly?

A. I have no secretary in my office.

Q. I mean the secretary of the Lodge. They have a schedule of your office hours, don't they?

(Testimony of Dr. Edward B. Riley.)

Mr. Chavelle: I object. I think we should have one question at a time here.

Mr. Winter: I will withdraw it. doesn't the Lodge have your telephone number?

A. Why certainly.

Q. And they have your office hours, which you furnish?

A. My telephone number is in the local telephone directory. Everybody has access to it.

Q. And you also furnish the secretary, as you have testified,—You have been there since 1917; but you have in the past furnished them with your office hours personally?

A. Well, all physicians have office hours, naturally, when they are in their office or supposed to be in their office, as far as their work permits them to do that. I can give you one of my cards showing my office hours, the same as I would give it to a private patient. [15]

Q. You have been operating as a physician substantially under the provisions of the constitution, as there provided?

A. Well, I have been serving this office for a period of years past and evidently my services have been satisfactory or I probably wouldn't be in the office today.

Q. Your fees, the fees of the aerie physician, may be changed by the aerie at any time when such requirements conflict with the laws of the committee or for any reason, can't they?

A. On approval, I think, of the grand aerie.

(Testimony of Dr. Edward B. Riley.)

Q. On approval of the grand aerie?

A. The Chief Auditor, and the Chief Auditor of course is an employee of the Grand Aerie.

Q. And also, "When it shall appear to the satisfaction of the Chief Auditor by reason of the rules of any Medical Society or for any other reason it is impossible to secure the services of an Aerie Physician" your services may be dispensed with?

A. Well, that is an inference, as I take it, the question as you ask now. Will you repeat the question, though?

Q. All right. We will withdraw it. You are familiar with Section 18 of Article 15 of the constitution are you not? A. What is it?

Q. Dispensing with Aerie Physician.

A. I am reasonably familiar with the constitution. I can't quote the section verbatim, and I can't state off hand in a general way what the provision is, necessarily.

Q. Well, the provisions for Aerie Physician under the constitution has been substantially the same since you went into the Lodge as Aerie Physician. Isn't that correct? [16]

A. I don't know of any great changes that have been made in recent years.

Q. And you, of course, knew what all of these provisions were when you were elected, didn't you?

A. I knew what it was customary to do.

Q. Now, under the constitution, we have these things provided in the constitution: First, under

(Testimony of Dr. Edward B. Riley.)
the constitution you are required to attend all meetings, to be in good standing——

Mr. Chavelle: I object. He has gone through that and now he is going through that the second time, and I object to it as repetition.

The Court: Wait until he finishes his question.

Q. ——In good standing in the aerie, and to perform minor medical services for that Lodge, are you not?

The Court: I think it is repetition. He was asked questions if he had to attend all meetings, but he may answer anyway.

A. I am supposed, naturally, to attend the meetings within reason. If my evening office hours prevent my attending at the meeting, naturally, I can not be there. If my work or my evening hours prevent me from being there in time, naturally I won't be there. I may be there later in the evening, and I may not be there at all. That depends entirely, of course, upon the work, though.

Q. Exactly. How often do you make reports as to the condition of the sick?

A. I make a verbal report to the secretary when the patient, if he is a member,—If the patient is a member at the time of the incident of his sickness or his disability, [17] because he is going to be entitled to benefits within a certain number of days afterwards, and he is not entitled to benefits until his sickness has been reported to either the secretary or to the Worthy President.

(Testimony of Dr. Edward B. Riley.)

Q. Have your down-town office hours, away from the Lodge, been substantially the same?

A. Ever since I have been in practice, generally speaking.

Q. And you maintain the same office?

A. Indeed, in the same rooms.

Q. Probably the same telephone number?

A. Yes,—Well, I have had my telephone number for—Well, since I have had my own home, which has been twenty-six or -seven years.

Q. Now, your compensation as aerie physician, is that paid directly by the Lodge each quarter?

A. Paid by the Lodge in January, April, July and October, for the previous quarter.

Mr. Chavelle: I object to that as repetition.

Mr. Winter: You may examine.

Re-direct Examination

By Mr. Chavelle:

Q. Doctor, in these reports Mr. Winter referred to, what do they contain? A. Reports?

Q. Reports to the secretary.

A. I inform the secretary as to the name of the member who is ill, or is injured, or who has become disabled, and the date when the disability started.

Q. Does that report consist of how you treat the member [18] or what medicines you give him?

A. None whatever.

Q. Or what services you render?

A. No. I call up the secretary and tell him that John became ill last night, and that is the report.

(Testimony of Dr. Edward B. Riley.)

Q. Referring again to aerie meetings. Are you subject to a penalty if you do not attend these meetings? A. No, sir.

Q. (By the Court): The matter of whether you attend the meetings or do not attend the meetings and what penalties, if any, shall be imposed is left to the local organization? A. Yes, sir.

Q. And any member in good standing who submits himself to you for treatment is entitled to your services, with the exception which you have noted?

A. Providing he is in good standing, as shown by his official receipt, which I am required to ask to see.

Q. But the member is also free to dispense with your services, when he is ill, and select a physician of his own choice?

A. Just the same as a patient in private practice; he can do the same thing, your Honor.

Mr. Chavelle: That is all.

Witness excused.

Mr. Winter: Will you stipulate this is the constitution, if we want to offer it?

Mr. Chavelle: Yes. [19]

WILLIAM OLIVER,

a witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your name, please?

A. William Oliver.

Q. Where do you reside?

A. Aberdeen, 309 Congress street.

Q. What is your occupation?

A. Secretary of the Eagles.

Q. What Eagles?

A. Aberdeen Eagles, No. 24.

Q. How long have you served as Secretary of Aberdeen Aerie No. 24, Fraternal Order of Eagles?

A. Twenty years.

Q. Continuously? A. Yes.

Q. Do you have an Aerie Physician?

A. We do.

Q. And who was your Aerie Physician from January of 1928 to January 1, 1931?

A. Dr. Riley.

Q. Is that the doctor who just testified?

A. It is.

Q. Do you know whether Dr. Riley is an established physician in the City of Aberdeen?

A. He is.

Q. And do you know how long Dr. Riley has been the practicing physician in the city of Aberdeen?

A. Well, as long as I can remember—1909 1910.

(Testimony of William Oliver.)

Q. How long has he been, and how is he selected, Mr. Oliver? A. Elected each year.

Q. And is that by the membership?

A. It is.

Q. Can you state whether the membership and the officers of Aberdeen Aerie No. 24 compel the Doctor to attend meetings?

A. No, he is not compelled.

Mr. Winter: I object to that as irrelevant and immaterial. Under the Social Security Act the fact that they do not compel him, if they have the right to, is sufficient. The fact that this witness may testify they don't do it, they don't exercise that right granted by the constitution is immaterial as long as they have the right to do it.

Mr. Chavelle: The law gives the ultimate control——

The Court: Proceed.

Q. (By Mr. Winter): Answer that question, please. How is the aerie physician's compensation fixed, Mr. Oliver?

A. Based upon the membership in good standing.

Q. Who determines that?

A. The secretary.

Q. That is yourself? A. Yes.

Q. Do you have the privilege call upon the Aerie Physician's time? In other words, do you require the Aerie Physician to give preference to your members over his own patients?

A. No, sir.

(Testimony of William Oliver.)

Q. Are any of the Aerie Physician's services performed in your premises? [21] A. No, sir.

Q. Where are they performed?

A. In his office I suppose, mostly.

Q. Is he required to,—the Aerie Physician—required to submit to the Aerie any reports?

A. He does.

Q. And for what purpose?

A. So that the secretary will have a record of those that are sick?

Q. And that report is referred to the Sick Committee or the Visiting Committee? A. It is.

Q. Does the report set out to you in detail what has been done or how it has been done by the Aerie Physician? A. No, it does not.

Q. Do you have any right to direct the Aerie Physician in the treatment of the members who apply to him for services? A. Not me.

Q. Do any of the officers of the Aberdeen Aerie No. 24? A. They do not.

Mr. Winter: I object to that as calling for a concusion. The constitution is the best evidence.

The Court: There is no contention of that kind, is there, Mr. Winter?

Mr. Winter: No contention of what kind?

The Court: That the Lodge or any member of it has a right to direct the physician as to any treatment, or its kind, character, and so forth?

Mr. Winter: No. As far as the physician is concerned, he uses his best judgment. [22]

Mr. Chavelle: You agree to that?

(Testimony of William Oliver.)

Mr. Winter: Oh, yes.

Q. (By Mr. Chavelle): Mr. Oliver, will you state how you may discharge an erring physician, what procedure is involved, if any?

A. Well, I have forgotten. In Aberdeen, we don't have no complaints; but if we did have complaints, it would have to be brought in to the Worthy President by a complaint, and the Worthy President would appoint a grievance committee, a trial committee, and it would be tried before that trial committee.

Q. (By the Court): Well, you proceed with the discharge of your position the same as you would with any other officer of the organization?

A. Oh, yes.

Q. There is no difference, is there?

A. No.

Q. (By Mr. Chavelle): Do you contribute to the overhead of the doctor's office?

A. No, sir.

Mr. Winter: Does he pay his dues?

(No answer.)

Q. (By Mr. Chavelle): Do you require that the physician is available at all times?

A. No, sir.

Q. Do you furnish the medicine? Or does the doctor furnish the medicine?

A. Paid for by the individuals, I believe.

Mr. Winter: We don't contend the Lodge actually furnishes any medicine or surgical instruments, except as to what in- [23] struments he

(Testimony of William Oliver.)

might purchase out of the $.50 per member that he is paid.

Q. (By Mr. Chavelle): Do you require, at the Aberdeen Aerie, to maintain an assistant in his office? A. No, sir.

Q. Does he maintain an assistant?

A. Not to my knowledge.

Q. Has he at any time maintained an assistant?

A. No, not to my knowledge.

Mr. Chavelle: You have no objection to the introduction of this list covering the pay involved from Aberdeen Aerie?

Mr. Winter: No.

Mr. Chavelle: At this time I will offer that in evidence, then.

The Court: It will be admitted in evidence.

Statement of pay received admitted in evidence and marked Plaintiff's Exhibit 1.

Mr. Winter: May I ask one question?

Mr. Chavelle: Yes.

Q. (By Mr. Winter): Showing you what has been marked as plaintiff's exhibit 1, that statement was prepared by you, was it? A. Yes.

Q. (By Mr. Winter): Showing you what has been marked as plaintiff's exhibit 1, that statement was prepared by you, you say, and shows the amount which has been paid by you to the various people connected with the Aerie during the period therein shown, here in issue? A. Yes, sir.

[24]

(Testimony of William Oliver.)

Q. These do not show the amount which was paid to you as Secretary? A. Paid to me?

Q. Yes. A. No, sir.

Q. (By the Court): Well, was the Secretary involved?

Mr. Winter: He was not involved. They said he was an employee. Isn't that true?

Mr. Chavelle: That is correct.

The Court: We will now adjourn until 1:45 p. m.

(Noon adjournment.)

Q. (By Mr. Chavelle): Does the Aerie Physician render any other service to your aerie, outside of medical service? I am referring particularly to the period involved. A. He does not.

Q. Do you know whether Aberdeen Aerie No. 24 in the years 1928, 1929 and to September 30, 1941, paid a Federal Income Tax?

A. It did not.

Mr. Winter: I object to that as irrelevant and immaterial and not an issue in this case, and I ask that the answer be stricken.

The Court: It does not meet the question that it is being tried to the Court. If it is not relevant or material, the Court will not consider it.

Mr. Winter: We have no objection to this document presented by counsel.

Mr. Chavelle: I want to offer the claim for refund in evidence.

The Court: That will be admitted, then, there being no objection. [25]

(Testimony of William Oliver.)

Claims for refund admitted in evidence and marked Plaintiff's Exhibits Nos. 2, 3, 4, and 5.

Q. (By Mr. Chavelle): Now, during the year 1938, Mr. Oliver, did you or your aerie have a Worthy President? A. Yes, sir.

Q. Did you list him as one of your employees for that period, 1938?

A. I did, after I found out that we were subject to pay this tax.

Q. What was his name in 1938?

A. Well now,——

Q. (By Mr. Winter): Was his name and the compensation he was paid at that time listed on this exhibit?

A. It would be pretty hard for me to remember that far back, that number of years.

Q. (By Mr. Chavelle): Was his name Vernon Bagley? Do you know? A. Yes.

Q. What compensation did he receive during that time from Aberdeen Aerie No. 24?

A. One dollar a year.

Q. How was that compensation fixed? How did you determine what the Worthy President should receive?

A. It is in the constitution that the Subordinate Aerie may pay him, and you have it in your By-Laws of each Subordinate Aerie.

Q. What are the duties, generally, of the Worthy President?

Mr. Winter: Do you mean as provided by the constitution? [26]

(Testimony of William Oliver.)

Mr. Chavelle: As provided by the constitution, and the matter of practice.

Mr. Winter: We submit the constitution is the best evidence.

The Court: I think that doubtless covers that. It is unnecessary.

Q. (By Mr. Chavelle): Are his duties of a ritualistic nature?

Mr. Winter: I object to that as calling for a conclusion of the witness on an issue that may be for the Court to determine, and not for this witness.

The Court: I think that might even be admitted, that this is a fraternal organization.

Mr. Winter: We admit it is a fraternal organization, but we do not admit that his duties are entirely ritualistic. He is still an officer of the corporation, of a fraternal organization.

The Court: This witness may answer. Of course it is just a conclusion of this witness. I take it for all practical purposes in this trial it is admitted that this is a fraternal organization?

Mr. Winter: Yes, your Honor.

Q. (By Mr. Chavelle): Mr. Oliver, does that purport to be the constitution of a subordinate aerie, under which you operate? A. It is.

Mr. Winter: I have no objections.

Mr. Chavelle: I offer it in evidence, your Honor.

The Court: It may be admitted.

The constitution admitted in evidence and marked Plaintiff's Exhibit 6. [27]

(Testimony of William Oliver.)

Q. (By Mr. Chavelle): How do you select your Worthy President?

Mr. Winter: I object to that. The constitution speaks for itself.

The Court: I think that is true, Mr. Chavelle.

Mr. Chavelle: All right, your Honor.

Q. During this period of time, Mr. Oliver, did you have a Worthy Vice-President by the name of O. I. Tucker, in 1938?

A. We did for a part of the term.

Q. And what compensation did he receive?

A. A dollar a quarter.

Q. And his duties are governed by the constitution? A. Yes, sir.

Q. Referring to plaintiff's exhibit 6?

A. Yes, sir.

Q. During that period of time did you have in your employ a Treasurer, 1938? A. Yes, sir.

Q. And was his name J. P. Bullington?

A. Yes, sir.

Q. What compensation did he receive?

A. $5.00 a month.

Q. And during this period of 1938, did you have a conductor in your aerie? A. Yes, sir.

Q. What compensation did he receive?

A. $1.00 a month.

Mr. Winter: We want the record to show, if the Court please, that we are objecting to these questions and answers and ask that they be stricken on the ground that there is no [28] allegation in

(Testimony of William Oliver.)

the complaint, claiming *and* refund for taxes with respect to the conductor.

Mr. Chavelle: If the Court pleases, that is a claim for refund in the statement, form SS-1-C.

(No ruling.)

Q. (By Mr. Chavelle): Who was your conductor at that time? A. What year was that?

Q. 1938. Was it J. P. (Dick) Foley?

A. I believe it was.

Mr. Chavelle: We filed a claim for refund, and in the complaint it is set forth.

(Extensive argument.)

The Court: I think I shall overrule the objection and allow him to answer.

Q. (By Mr. Chavelle): What compensation did you say the Conductor received during 1938?

A. $1.00 a month.

Q. Did you also have trustees during the period of 1938? A. Yes, sir.

Q. Three trustees or more? A. Three.

Q. And their names were Curtis, Merritt and Heintz. Is that correct? A. Yes.

Q. What compensation did they receive?

A. One dollar a quarter.

Q. How was their compensation fixed?

A. By the constitution, the same as the others, and had it inserted in their By-Laws. [29]

Q. And their duties are outlined in the constitution, referring to plaintiff's exhibit No. 6?

A. Yes, sir.

(Testimony of William Oliver.)

Q. Did you also have during the year 1938 an auditing committee? A. Yes, sir.

Q. How many members of the auditing committee are there? A. Three.

Q. How are they selected?

A. The Worthy President appoints them.

Q. The Worthy President appoints them?

A. Yes.

Q. Is that provided for in the constitution?

A. Yes.

Q. What compensation do they receive?

A. One dollar a month each.

Q. For what period of time do they serve?

A. If they fill out their full term, it is yearly.

Q. And are their duties also set forth in the constitution? A. They are.

Q. Now, I will ask you whether or not the treasurer is regularly employed by you?

A. By the Lodge.

Q. Does he devote his entire time to your aerie?

A. No.

Q. Is he employed elsewhere? A. He is.

Q. During the time in question was he employed elsewhere? A. He was. [30]

Q. Does he perform the services on your premises or off of your premises?

A. Well, the treasurer comes to the secretary's office and gets the money and takes it to the bank and deposits it.

Q. Does he make a treasurer's report?

A. He does.

(Testimony of William Oliver.)

Q. Does he do that under his own direction or your direction? A. His own direction.

Q. (By the Court): What did you say the compensation of the treasurer was?

A. $5.00 a month.

Q. (By Mr. Chavelle): Is that fixed by the constitution?

A. No, I don't think it is. You have to insert that in your By-Laws.

Q. Now, calling your attention to the conductor, in plaintiff's exhibit 6 at page 35, article 17, entitled "Duties of the Worthy Conductor." I will read a portion of that and ask you if that represents the duties he performs? A. Yes, sir.

Q. "Shall satisfy himself that all persons who are present at the time of any session are entitled to remain. No member or visitor shall be permitted at a meeting unless his dues shall have been paid in advance." A. It is.

Q. And does he also have to do with visitors, as therein provided? A. Yes, sir.

Q. And where is that done? In the aerie room or outside?

A. In the aerie room. The visitors are introduced before [31] they start, at the altar.

Q. Does he attend your meetings?

A. Yes, sir.

Q. How often do you have meetings?

A. We have meetings every week, every Friday.

Q. Now, referring to section 4, "Custody of Property". Does he have custody of property?

(Testimony of William Oliver.)

A. Yes, sir.

Q. What properties are they referring to?

A. The regalias and flags and banners which are placed in the aerie room and what stuff is in the aerie room, whatever it may be.

Q. You speak about regalia. Is that something the officers wear? A. Yes.

Q. Section 5, "Disposition of the property". It reads:——

Mr. Winter: That is in evidence. I don't *thing* you need to go into detail to that extent, to read it. I think with the exhibit in evidence and the general question asked him as to whether or not the conductor performs the various duties set forth in the constitution and By-Laws and what his compensation in that regard is, would be sufficient.

The Court: Yes.

Q. (By Mr. Chavelle): I will ask you about this article 17, "Duties of the Worthy Conductor" in plaintiff's exhibit 6, I will ask you if that purports to be the duties that he performed for your aerie during the period of 1938? A. It is.

Q. What was that compensation, again?

A. Additional $1.00 a month. [32]

Q. Is it customary that the President, Vice-President, Treasurer, Trustees, Conductor and the Auditing Committee are generally employed elsewhere? A. Every one, I understand, are.

Q. How often do they come to your aerie home?

A. The officers?

(Testimony of William Oliver.)

Q. Yes.

A. That is pretty hard to say. Our officers are all alternatives.

Q. Is it their general practice to all be there on meeting nights, which you have stated are Friday nights? A. It is.

Q. (By the Court): Do their duties require them to be there at other times?

A. Yes. At times the auditing committee has to be.

Q. (By Mr. Chavelle): Are substantially a majority of their duties performed in the aerie room?

A. They are.

Q. Is the President and the Vice-President required to consent to the——

Mr. Winter: Just a minute! I object to that as irrelevant and immaterial, and the fact is shown here, the requirements and what they have to do are embodied in the constitution.

The Court: I do not suppose the Government is contending here that these people do not perform the duties that were required of them by the ritual of the order?

Mr. Winter: No. We admit that. That is the reason we think the constitution is the best evidence of what they have to do. I think we will concede that they have to—— [33]

Q. (By Mr. Chavelle): I will ask you, Mr. Oliver, in 1939 did the President, Vice-President, Treasurer, the Conductor, Trustees and Auditing

(Testimony of William Oliver.)

Committee receive the same compensation as they did in 1938?

Mr. Winter: We will object to that on the ground that he is asking about the Vice-President. His complaint alleges that they are seeking a refund of the moneys paid and consequently it is,—whatever their claim for refund, it makes no such allegation.

The Court has no jurisdiction to hear anything with respect to any claim made in the complaint and not made in the claim for refund.

The Court: Of course that is a fact we will have to pass upon ultimately, as a matter of law. He may answer this question.

A. You mean the salary is changed or not changed?

Q. (By Mr. Chavelle): I am asking you whether it is the same or not? A. The same.

Q. (By the Court): And the duties were the same? A. Yes.

Q. (By Mr. Chavelle): The duties were the same? A. Yes.

Q. (By the Court): That is the same as 1938?

A. Yes.

Q. (By Mr. Chavelle): The duties in 1939 of all of these officers was the same as 1938. Is that correct? A. It is.

Q. Now, do you know whether or not in 1940, whether you paid any tax upon the President, Vice-President, Treasurer, [34] Conductor or the Trustees or the Auditing Committee?

(Testimony of William Oliver.)

Mr. Winter: I object to that as incompetent, irrelevant and immaterial. Now, as far as the record shows, no claim for refund has been filed with respect to these individuals. That is definite and certain and was agreed to by Mr. Chavelle. He said that he conceded that the President, Vice-President, Secretary, Treasurer, Conductor were individuals——

Mr. Chavelle: I agree to that. I will let it be stricken.

Q. In 1940 you paid an Aerie Physician. Is that correct? A. Yes, sir.

Q. And under Title VIII of the Social Security Act, did you file a claim for refund of the amount paid? A. Yes.

Mr. Winter: The claims are admitted in evidence.

The Witness: Yes, we did.

Q. (By Mr. Chavelle): And the same is true of January 1, 1941 through September 30, 1941? Is that correct? A. It is.

Q. (By the Court): Now, in 1940 the amendment was passed, was it not?

Mr. Chavelle: Yes. That is admitted by counsel, in 1941.

Mr. Winter: The fact no tax was assessed and no claim was filed shows that. While the complaint includes refunds on two physicians, counsel also stipulated before he had the report that only one was involved, and the amount of compensation is shown in plaintiff's exhibit 1.

(Testimony of William Oliver.)

Mr. Chavelle: That is correct. That is agreeable. That is all.

Cross Examination

By Mr. Winter: [35]

Q. I take it, Mr. Oliver, the constitution, then, provides for all the duties of the physician, president, vice-president, treasurer, conductor, financial trustee and auditing committee. Is that right?

A. Provides for their duties?

Q. Yes, what duties that are required of them to perform. A. Yes.

Q. And is it a fact during the period here involved they did perform those duties?

Mr. Chavelle: Do you understand the question, Mr. Oliver? A. Yes.

Q. (By Mr. Winter): Under the constitution there are one or two things I want to find out. Under the constitution the treasurer is responsible for all finances of the Lodge?

A. He is after he gives me a receipt.

Q. And makes financial reports to the Lodge?

A. Yes.

Q. At the regular meetings of the Lodge?

A. Yes.

Q. He is required to and does he keep monthly accounts and annual financial reports. Is that a fact?

Mr. Chavelle: I object to that as not the best evidence. The best evidence is the constitution, and it sets forth his duties. He answered the first ques-

(Testimony of William Oliver.)

tion that this particular individual as to whom he is testifying carried on the duties as set forth in the constitution. Now, counsel goes into the particular section of the constitution. It is repetition.

The Court: It is repetition, but he may answer.

(Question read.)

A. Yes, sir. [36]

Q. Now, I take it these salaries which you say were paid, these amounts which were paid these various individuals, were either provided by the constitution or the By-Laws of the Lodge?

A. Yes, sir.

Q. And they were actually paid?

A. Yes, sir.

Q. And you were the secretary?

A. Yes, sir.

Q. You are paid a salary, are you?

Mr. Chavelle: I object to that. There is no issue of the secretary involved in this case. It is immaterial and irrelevant.

The Court: He may answer.

Q. (By Mr. Winter): You are paid a salary?

A. Yes, sir.

The Court: I understand that is not in issue at all.

Q. (By Mr. Winter): Is that fixed by the constitution?

Mr. Chavelle: I object as not in issue here.

Mr. Winter: It is not in issue except as preliminary to a later question.

(Testimony of William Oliver.)

The Court: Proceed.

Q. (By Mr. Winter): Is the salary fixed? Is that fixed by the constitution or the Lodge?

A. By the By-Laws.

Q. By the By-Laws? A. Yes.

Q. I assume that the treasurer's salary is fixed by the By-Laws? A. Yes. [37]

Q. Do you have any other employees or individuals paid wages or—When we are talking about salaries, I do not mean by that—paid compensation which you allege in your complaint, other than those shown on this exhibit 1, which you filed, and yourself?

A. Why, my name isn't on that.

Q. I mean except yourself?

A. And the janitor and Riley's.

Q. Is Riley's in here?

A. Riley isn't in there—Yes, it is.

Q. Dr. Riley? A. Yes.

Q. He is the physician?

A. Yes. I don't think there is any.

Q. I think you testified that Mr. Riley's compensation was based upon the membership.

A. In good standing.

Q. And you determine that, do you?

A. I do.

Q. And discuss it with the other officers?

A. No.

Q. Mr. Riley is an officer of the Lodge?

A. Yes, sir.

The Court: Dr. Riley?

(Testimony of William Oliver.)

Mr. Winter: Yes. He is an officer of the Lodge?

A. Yes.

Q. And that is reported to the treasurer, the amount due him is reported to the treasurer by you. Is that so? A. I make the check out.

Q. Yourself? [38] A. Myself.

Q. And have the president sign it, do you?

A. Yes.

Q. Who else signs the check?

A. The treasurer.

Q. Who else?

A. The president, the treasurer and secretary.

Q. That is all provided in the constitution?

A. Yes.

Q. That is part of the regular duties, is it?

A. Yes.

Redirect Examination

By Mr. Chavelle:

Q. The doctor only renders services, medical services, and no other services in his capacity as a physician. Is that correct? A. That is all.

Q. Has he anything to do with the policy of the Aerie? A. None whatever.

Q. Has he, however, anything to do with the business affairs of the Aerie?

A. No more than any other member.

The Court: I want to ask you for my own information. Tell me again, what is the compensation of the president, a year?

A. One dollar a quarter; $4.00 a year.

(Testimony of William Oliver.)

Q. What is the compensation of the Vice-President? A. Four dollars a year.

Q. And the treasurer?

A. Five dollars a month, $60.00 a year. [39]

Q. And the conductor?

A. One dollar a month.

Q. Twelve dollars a year? A. Yes.

Q. And the trustees?

A. One dollar a quarter. There are three of them. Each gets that.

Q. Four dollars a year? A. Yes.

Q. And the auditing committee, one dollar a month each? A. Yes.

Q. How many of these? A. Three.

Q. That, apparently, includes the whole list?

A. Yes.

Mr. Chavelle: That is all.

Witness excused.

Mr. Chavelle: That is our case. With the court's and counsel's permission, I would like to re-open the case for the purpose of one more exhibit to be introduced in evidence.

The Court: Without objection, it may be admitted.

Mr. Chavelle: I now offer plaintiff's exhibit 7.

Mr. Winter: No objection.

The Court: Admitted.

The document admitted in evidence and marked Plaintiff's Exhibit 7.

Mr. Chavelle: The plaintiff rests.

Mr. Winter: The defendant rests, your Honor.

The Court: I would be glad to hear from you first, Mr. [40] Chavelle.

Mr. Chavelle: I have one suggestion and I might propose it to you. The Ballard case will also be tried, and it involves the same issues. It is under title 9 of the Social Security Act, rather than title 8, and in that case there is involved the Aerie Physician and ritualistic officers.

The Court: What features of 9 distinguish it from 8?

Mr. Chavelle: There is no real feature except title 8. It is the Federal Contributions Act, which is known as the Social Security, and title 9 is correctly known as the Federal Unemployment Compensation Act. One is social security and the other is employment compensation.

And in the Ballard case title 9 is involved. However, the physician is involved, as are the ritualistic officers, and I thought perhaps it would be better to try that case, and then I will make a complete argument.

The Court: Very well. You may proceed to make your record in that case.

[Endorsed]: Filed Jan. 29, 1944. [41]

In the District Court of the United States for the Western District of Washington
Southern Division

Civil Action

No. 466

SEATTLE AERIE No. 1 of the FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue of the United States of America,
Defendant.

Civil Action

No. 510

BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Be Is Remembered, That this cause came regularly on for hearing before the Hon. Charles H. Leavy, Judge of the above-entitled court, at Tacoma, Washington, on May 25, 1943.

Appearances:

For the Plaintiff,
Mr. Cornelius Chavelle of Messrs. Chavelle & Chavelle.

For the Defendant,
Mr. Thomas R. Winter, Special Assistant to the Chief Counsel.

Both sides having announced themselves ready for trial, the following proceedings were had: [3*]

Mr. Winter: I think we should have a stipulation.

It is stipulated that the Court may consider the same evidence, insofar as material, which was introduced in the Aberdeen case, as being considered introduced in this case.

The Court: Yes.

Mr. Winter: Now, in reference to these exhibits, the constitution and the testimony with respect to the physician and other individuals involved.

The Court: Very well.

Mr. Winter: With respect to the Ballard case, we have a stipulation.

Mr. Chavelle: If the Court please, if it is agreeable to the Court, as it has been agreeable to counsel, we will now commence with the case of Seattle Aerie No. 1, Fraternal Order of Eagles vs. Clark Squire, Collector of Internal Revenue of the United States of America.

At this time, if *it agreeable* that we go ahead

*Page numbering appearing at foot of page of original Reporter's Transcript.

with this case, I will make a brief statement for the Court.

The Court: Very well.

Mr. Chavelle: In this case, your Honor, there is involved under title IX of the Social Security Act, commonly called the Federal Unemployment Act, the question of whether or not certain members of the orchestra which performed for the Plaintiff, that is performs at a periodic dance, are employees of the Plaintiff or are employees of the leader of that orchestra.

The evidence will show that——

The Court: Now, is there a new question involved here?

Mr. Chavelle: Only the musicians.

The Court: In Seattle? [4]

Mr. Chavelle: In Seattle, yes, only the musicians. The record will show that——

The Court: Let me ask you: Was there any difference in levying the assessment for tax collection in the Seattle case over that of the others? Or was there no claim made or no protest filed?

Mr. Chavelle: The situation is, your Honor, that Seattle Aerie No. 1 has never been assessed as to the ritualistic officers or physicians. It has been overlooked by the Government, and the only question we have there is as to the musicians.

Mr. Winter: I didn't know that. All I know is what was involved in this case, and what claims have been filed with me. Apparently the Seattle Aerie has five or six physicians; and, further than that, they come under title IX because they have 8

or more employees, because they have a big social room where they have a lot of employees. The Ballard Aerie, in which they have 8 or more, too, come under title IX.

That which is involved in the Seattle case is because they have more than 9.

The Court: The Court is endeavoring to ascertain if the officers were assessed in that aerie the same as the one we just heard.

Mr. Chavelle: Throughout the state of Washington there is a great discrimination. Some aeries they do, and others they do not. In the case of Seattle Aerie No. 1, which is large, with a membership of 14,000, they have never assessed the physician. The ritualistic officers——

Mr. Winter: Of course, your Honor, I will give the Court [5] the real reason why there might be a discrepancy is because of the 1940 Act. Ritualistic officers, of course, would not be assessible, and in all probability they did not get the assessments in when the 1930 figures came in, they didn't go back and assess them before the statute of limitations expired or the claim for refund are still pending, I don't know. In any event, I have no definite knowledge. If counsel says that is the fact, it may be true. We don't get around to all taxpayers at the same time. These cases, while involving an insignificant amount of money—Not insignificant —but a small amount of money, may be very trifling, compared with 1700 aeries in the United States:

The Court: Is it a question of first impression,

as far as these others are concerned? Have these questions never been passed upon?

Mr. Winter: Never been passed upon, whether aerie physicians, physicians for any fraternal orders, were considered employees, or whether ritualistic officers are taxed, has never been determined by any Federal Court. And the same is true of musicians. To that extent, it has not been determined whether or not musicians who play for fraternal orders are taxed as employees. The question has been decided in a hotel and restaurant case, but not in a fraternal order.

J. M. HOOPER,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your full name, please? [6]

A. J. M. Hooper.

Q. Where do you reside?

A. 4014 First Avenue Northeast, Seattle.

Q. And are you a member of the Fraternal Order of Eagles? A. I am.

Q. What aerie? A. Seattle Aerie No. 1.

Q. How long have you been a member of the Eagles? A. Since 1917.

Q. Have you ever held any state office?

A. Yes, I was state president three years ago.

(Testimony of J. M. Hooper.)

Q. Have you ever been an officer of Seattle Aerie No. 1?

A. Past President of Seattle Aerie No. 1.

Q. What is your present connection with Seattle Aerie No. 1?

A. I am one of the members of the Board of Trustees.

Q. Now, I will ask you, Mr. Hooper, whether or not in 1936 Seattle Aerie No. 1 held dances?

A. They did.

Q. And under whose direction were those dances arranged? A. They were under my charge.

Q. Were you the Chairman of the committee for the purpose of sponsoring those dances?

A. I was placed in charge with the other two members of the Board.

Q. What was your official title, if any?

A. Manager.

Q. Now, I will ask you to state whether any dances were held by Seattle Aerie No. 1?

A. They were held every Saturday night. [7]

Q. Every Saturday night during the year 1936?

A. Yes, sir.

Q. And where were these dance halls?

A. In the Eagles Auditorium, Seattle, now called the Senator Auditorium.

Q. In your own building?

A. That is our own building.

Q. Did you hire the orchestra?

A. I did not.

(Testimony of J. M. Hooper.)

Q. Did you contact the leader?

A. The leader contacted me when he found out we were going to open a dance.

Q. During the year 1936, did you have the same orchestra play for you?

A. The same orchestra.

Q. And what was the name of the leader? What was the name of the leader of that orchestra during 1936? A. Bill Winder.

Q. Did he operate under any trade name?

A. He called his orchestra "The Senators."

Q. What was his orchestra advertised as then?

A. It was advertised as "The Senators."

Q. How did you arrange for the appearance of Bill Winder and "The Senators"?

A. The arrangement was made two years before, 1934.

Q. To clarify this, possibly, is it true that you were sponsoring dances prior to 1936?

A. Yes, started in 1934.

Q. Will you explain what arrangements you made in order to secure the services of Bill Winder's Senators? [8]

A. He found out we were going to open a dance and he came up to me and wanted to put his orchestra on those dances, and I took it up with the members of the Board of Trustees as to the Senators, and they authorized me to go ahead and have Mr. Winder put his orchestra in.

Q. In that connection, did you have a written contract with Mr. Winder, or an oral contract?

(Testimony of J. M. Hooper.)

A. Oral agreement.

Q. Now, during the year 1937 do you recall what orchestra played at your dances?

A. Bill Winder's Senators.

Q. During the year 1938 do you recall what orchestra played at your dances?

A. Bill Winder and the Senators.

Q. During 1939 do you recall what orchestra played at your dances?

A. Bill Winder and his Senators.

Q. During the years 1936, 1937, 1938 and 1939 how often did you hold those dances?

A. Every Saturday night.

Q. Did you come to an arrangement as to the organization, so far as the services rendered by Bill Winder's orchestra each Saturday night?

A. All we told him was that we wanted the minimum number of men for a hall of that kind.

Q. Did you, as far as the payment of the orchestra's services were concerned, were you in contact with him? Or were you in contact with the individual members of the organization?

A. With him entirely.

Q. After the orchestra performed their services for you, [9] who was paid? The leader? or the individual members of the orchestra?

Q. Do you know whether or not the leader paid the individual members of the orchestra?

A. I do not.

Q. Did you pay them? A. I did not.

(Testimony of J. M. Hooper.)

Q. Did the members ever ask you about paying them? A. The individual members?

Q. The individual members of the orchestra?

A. No, they did not.

Q. Approximately at what hour would these dances start on Saturday night?

A. Started at nine o'clock and closed at 12:30.

Q. Was it understood before Bill Winder entered into this agreement to render services for you that the orchestra would start at nine o'clock?

A. That was the understanding when we first started in, because on Saturday night the dances run three and a half hours, and during the week they run three hours.

Q. Did you have any discussion with Mr. Winder as to the type of music to be played at those dances?

A. No, he made his own arrangement as to the music. We had nothing to do with it.

Q. Did you furnish the music?

A. Furnish the music?

Q. Who did furnish the music?

A. I suppose Mr. Winder did.

Q. Do you know who set the intermissions, if any? A. Mr. Winder.

Q. Did you have intermissions? [10]

A. We had intermissions.

Q. Did you have the right to discharge any individual member of the orchestra?

Mr. Winter: I object to that as calling for a

(Testimony of J. M. Hooper.)

conclusion. He can set forth what his contract was, if he claims it was a contract, independent contract.

The Court: I think he may answer.

A. We had nothing to do with any orchestra, nor had any authority over him whatsoever.

Q. Did you have a separate contract?

Mr. Winter: That does call for a conclusion. Now, as he was the agent of the Union to secure the services of the musicians and he thought he had a right under the authority given him by Seattle Aerie No. 1, he had the right to discharge any musician.

Q. (By Mr. Chavelle): I will ask you to answer the question? A. I had no right.

Q. Was the control of the dances under your exclusive control? A. They were.

Q. So designated by Seattle Aerie No. 1. Is that correct?

A. At the direction of the Board of Trustees.

Q. Did you ever have occasion to have any discussion with any of the individual members of the orchestra during the period of 1936, 1937, 1938 and 1939? A. I did not.

Q. Did you ever come into contact with any individual member of the orchestra?

A. Just to speak to them. I didn't even know their [11] names.

Q. Were they paid on a monthly basis or weekly basis or on performance?

A. Performance. That is every Saturday night was each performance.

(Testimony of J. M. Hooper.)

Q. Did you or Seattle Aerie No. 1 supply the instruments which were used?

A. No, we did not.

Q. Did this orchestra which played for Seattle Aerie No. 1 at their dances during 1936, 1937, 1938 and 1939 have any designation as to their name?

A. They called themselves "The Senators," "Bill Winders and his Senators."

Q. Was there any identification on their music stands?

A. They had a letter "S" on their music stands.

Q. Is it true at all times during 1936, 1937, 1938 and 1939 he operated under that name?

A. That is right.

Q. At all dances?

A. As far as I know.

Q. As far as your dances were concerned?

A. As far as our dances, and I don't know whether they played at any other place or not.

Q. Directing your attention to what purports to be Plaintiff's Exhibit No. 1, did you prepare this sign?

A. We had the painter paint this sign, yes.

Q. During the period 1936, 1937, 1938 and 1939 did you use this sign?

A. That and one similar.

Mr. Chavelle: I will offer that in evidence. [12]

Mr. Winter: We have no objection.

Mr. Chavelle: I wonder if we can stipulate, so far as the record is concerned, so we won't have to have it—I wonder if we can not stipulate it ap-

(Testimony of J. M. Hooper.)

pears to be a paper or a card sign about four feet by three feet, background with black and red letters, worded "Senator Auditorium Ball Room," in large printed letters; "Dance with Bill Winder and his Senators."

Mr. Winter: We will so stipulate.

The Court: Yes.

Mr. Winter: I understand you to say the red space the same.

The Court: It will be admitted in evidence for the purpose of the record.

(The sign admitted in evidence and marked Plaintiff's Exhibit 1.)

The Court: For the purpose of the record, the printing such as has been suggested by the stipulation may be used in place of the exhibit.

Mr. Chavelle: Yes, that is correct.

Q. I will ask you for what purpose you had that sign made?

A. To place in the lobby of the dance hall.

Q. Referring to plaintiff's exhibit 1?

A. Yes.

Q. And did you have similar signs upon the premises during the time that Bill Winder played for you as you have testified in 1936, 1937, 1938 and 1939? A. We had similar signs, yes.

Q. Did you ever have occasion to advertise Bill Winder's orchestra in any periodical? [13]

A. We advertised from time to time in the daily papers.

(Testimony of J. M. Hooper.)

Q. And what reference was made to the orchestra that was performing during 1936, at that time?

A. We used the same name as we used on the card over there, at all times.

Q. The same as plaintiff's exhibit 1?

A. That is right.

Q. Did you furnish the individual sheet music that was used by the orchestra?

A. We furnished no music.

Q. Who procured the individual members of the orchestra in question, that is Bill Winder's orchestra, which played for you as testified in 1936 to 1939, inclusive?

A. I presume Mr. Winder; he was the leader.

Q. Were you in attendance at all of these dances?

A. I was with the exception of two or three in six years.

Q. Will you state whether or not the individual members of the orchestra that appeared in 1936 also were in the orchestra in 1937?

A. Well, as I remember it, it was pretty well the same. There were a few changes, but a very few.

Q. But you did recognize over this period of time involved, 1936 to 1939, inclusive, that the orchestra was of a permanent organization?

A. Yes, sir.

Mr. Winter: I object to what he understood as calling for a conclusion.

(Testimony of J. M. Hooper.)

Q. (By Mr. Chavelle): Well, was it a permanent organization? [14]

Mr. Winter: I object as calling for a conclusion of this witness.

The Court: I think I will sustain the objection.

Q. (By Mr. Chavelle): Now, will you state whether or not Bill Winder and his Senators played during the year 1939 throughout 1939?

A. They did.

Q. Did you conduct these dances in 1940?

A. I did.

Q. And at what intervals were the dances held?

A. Every Saturday night.

Q. And where were they held?

A. In the Senator Auditorium Ball Room.

Q. Will you state whether or not the Senator Auditorium is a part of your building?

A. It is a part of our building.

Q. And during 1940, who did you have as the orchestra?

A. Well, there was a change about that time. I don't know the exact date.

Q. Well, approximately when was the change made?

A. About five and a half years, as I remember it, Bill Winder was released and we hired Arden Stevens.

Q. You say you hired Arden Stevens?

A. Arden Stevens. He was the director. He wanted to put a director in there and we hired him.

(Testimony of J. M. Hooper.)

Q. Did he operate under any name or what?

A. He called his orchestra the "Commodores."

Q. For what period of time did Arden Stevens and his Commodores play there?

A. I don't remember exactly,—a year or a little over [15] a year, and he went into service.

Q. During the year 1940 did he play for you?

A. I think that is it.

Q. Now, subsequent to 1940, during 1941, who played for you? Do you recall?

A. The orchestra was then taken over by Ken Cloud. He was the leader.

Q. Did he operate under any name?

A. He took over the orchestra as "The Commodores," as it was named before.

Q. That was in 1941?

A. 1940 and 1941, these two boys were in there. It might have been the last part of 1939.

Q. Let me ask you this, Mr. Hooper, concerning the arrangement made for the services of Arden Stevens and his Commodores, and Kenneth Cloud and his Commodores? Did you have a similar arrangement as you did with Bill Winder?

A. We did.

Q. Was it verbal or a written agreement?

A. Verbal.

Q. Did you have any dealings with the Musicians Union in obtaining the services of this orchestra?

A. None at all.

Q. Nor any during 1936, 1937, 1938, 1939, 1940

(Testimony of J. M. Hooper.)

and 1941, did you have any dealings with the Union in obtaining this orchestra?

A. No dealings whatever.

Q. I am referring to the Musicians Union.

A. Yes.

Q. I am asking you, Mr. Hooper, after Bill Winder's [16] services were concluded, which was the early part of 1940, as you have testified, whether or not you paid the individual members of Arden Stevens' orchestra or Kenneth Cloud's orchestra? or did you pay the leader?

A. I paid the leader at all times.

Q. Did you have occasion at any time during the period of 1936 to 1941 inclusive to discharge any individual members of that orchestra?

A. No, because we had nothing to do with them.

Q. Did you have any right to discharge them?

A. We had no right to discharge them.

Mr. Winter: I object to that as calling for a conclusion. The agreement is the best evidence. I don't know what the agreement was as yet.

Q. (By Mr. Winter): You say you had an oral agreement. Was that agreement for the period——

The Court: You will have an opportunity to cross examine him on that.

Q. (By Mr. Chavelle): When you approached these individual orchestra leaders, did you approach them for the purpose of obtaining an orchestra?

A. They approached me.

(Testimony of J. M. Hooper.)

Mr. Winter: We object to the question being leading. He can tell us what he did.

The Court: I think I shall sustain that objection, unless this situation is different from that of the employment of the first orchestra. If it is the same that he testified the leader of the orchestra came to him and solicited the employment——

Q. (By Mr. Chavelle): Upon each occasion there was a dif- [17] ferent orchestra employed, did they come to you or did you contact the leader?

A. They came to me.

Q. And what agreement, if any, did you enter into on each occasion that you hired the orchestra?

A. The same as the last one. All we wanted was the minimum number of members for the hall, and he was to furnish the orchestra.

Q. Is that true in all instances during the period of 1936 through 1941 inclusive?

A. Yes, that is right.

Q. Did you have the same arrangement with each orchestra leader? A. We did.

Q. Was that a verbal or a written contract?

A. Verbal contract; verbal agreement.

Q. Was the compensation fixed at the time these services were requested?

A. No compensation fixed. We just paid the regular price for the orchestra of that size.

Q. Who told you what the price of the orchestra would be? A. The leader.

Q. What agreement, if any, was there as to the discharge of the leader?

(Testimony of J. M. Hooper.)

A. We could discharge the leader on two weeks notice.

Q. Was that provision entered into at the time you entered into the arrangement with the various leaders?

A. That is what we understood was the time required for discharging an orchestra.

Mr. Winter: Time required by what?

A. As far as I know, the leader said that the time they [18] would have to have would be two weeks notice in case of a discharge.

Mr. Winter: Union rule?

A. As far as I know. I don't know whether it was or not.

Mr. Chavelle: Is that what the leader told you in each instance?

A. That is right.

Q. (By the Court): You mean that you had the right, as you understood your oral contract, to discharge the leader, but keep the orchestra?

A. No, we couldn't keep the orchestra. That would mean discharge the leader, and the orchestra would go with him. We had no right to discharge the orchestra.

Q. (By Mr. Chavelle): Did you or any of your individual members upon any occasion ever direct the orchestra as to their music that they played at these various dances?

A. Never at any time.

Q. When did Wayne Fowler's orchestra play? For what period?

(Testimony of J. M. Hooper.)

A. It was right after Arden Stevens. I can't say the exact date.

Q. Was it in 1941?

A. I don't remember.

Q. Or 1942, or when?

A. I think it was part of 1941 and part of 1942. I am not sure as to the dates.

Q. Do you recall who was playing during the first quarter of 1941, that is January or February or March? A. I don't remember. [19]

The Court: If you have that data there before you, why not refresh his memory from it? It is not a matter you need to put a great deal of time on.

Mr. Chavelle: I ask that this be marked.

(The document marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Chavelle): I ask you to state what Plaintiff's Exhibit 2 purports to be?

A. A check to Arden Stevens for the services of that orchestra.

Q. Do you recognize the signatures on there, signed by the Worthy President, the Secretary and the Treasurer? A. They are.

Q. And what was the date of that check?

A. June 13, 1941.

Q. Who was it made payable to?

A. Arden Stevens.

Q. For what purpose?

A. Music played on that night, the second night following this day.

(Testimony of J. M. Hooper.)

Mr. Chavelle: I ask that this be introduced in evidence.

The Court: He says "following day". He meant "preceding."

The Witness: Yes.

Mr. Winter: No objection.

Mr. Chavelle: I will offer it in evidence.

The Court: Any objection?

Mr. Winter: No objection.

The Court: It will be admitted.

(The check admitted in evidence and marked Plaintiff's Exhibit 2.) [20]

Q. (By Mr. Chavelle): Mr. Hooper, do you know whether Arden Stevens' Commodores were playing during the first quarter of 1941, this exhibit 2 being dated June 14, 1941?

A. Yes, that is about the time.

Q. Do you know whether Arden Stevens' Commodores were playing for you in January, February or March, 1941?

A. I am not sure on the date.

Mr. Winter: If you have got the checks there.

The Court: I don't think you need to take all the time to go into that. I understand there is no contention that the situation was dissimilar with the second orchestra leader than it was with the first, or the second or the third.

Mr. Winter: No. They have been hiring orchestras for 30 years in the same way, and we have affi-

(Testimony of J. M. Hooper.)
davits to that effect. Have you any other checks you want to introduce?

Mr. Chavelle: Yes, we will have them marked.

Mr. Winter: I don't think it is necessary.

(Checks marked for identification plaintiff's Exhibit 3.)

Q. (By Mr. Chavelle): Referring to Plaintiff's Exhibit marked for identification No. 3, state what that is.

Mr. Winter: We object to the introduction of the exhibit in evidence as irrelevant and immaterial.

Mr. Chavelle: You object to it, then?

Mr. Winter: Except as to its materiality.

The Court: Objection overruled. The exhibit will be admitted in evidence.

(The checks admitted in evidence and marked Plaintiff's Exhibit 3.)

The Court: I do not know that it is necessary to put [21] all these checks in, unless there is a difference in the method of paying them. If the two offered in evidence typify and represent the method of payment, in all instances, that is all that should be necessary.

Mr. Chavelle: I do not know. I will ask him.

Q. Is that true, Mr. Hooper, that the orchestra leader was paid direct in each instance during the period involved here?

A. In this same manner.

Q. He was paid personally with a check?

A. Yes.

(Testimony of J. M. Hooper.)

Mr. Chavelle: That is all.

The Court: We will take a short recess.

(Recess.)

Mr. Chavelle: I believe I have finished, Mr. Winter.

Cross Examination

By Mr. Winter:

Q. Now, Mr. Hooper, you say you are the manager of the dances that are given by the Lodge weekly? A. I was.

Q. Are you still manager?

A. Not at the present time.

Q. When did you cease to be?

A. About September last year.

Q. Of 1942? A. Yes.

Q. But during the period here involved, from 1936 to the biggest part of 1941 you were manager of the dance?

A. Manager, under the direction of the aerie and the trustees. [22]

Q. Who composed the trustees? Mr. Dodds, was he a trustee?

A. Me, Mr. White and Mr. McKnight at the present time.

Q. Those are what we call public dances?

A. Yes.

Q. For which the Lodge charges an admission price? A. Charges an admission price.

Q. And the public generally is open to attend the dances, provided they pay the admission price, plus the tax due on admissions?

(Testimony of J. M. Hooper.)

A. Yes, the public and the members, too.

Q. And when did you first become the manager of the dances? A. 1934.

Q. And Bill Winder, I think you testified, came to see you about furnishing the orchestra?

A. Furnishing his orchestra, yes.

Q. And you discussed with him what the charge for the orchestra would be?

A. I asked him how much it would be for each event, and he told me.

Q. Now, you said something, you told him you would require the minimum number for the number of musicians for the hall. Did you mean by that that the Union would require, from the hall, union members?

A. Yes. The union sets a minimum number for each hall.

Q. And they also set a minimum wage for the musicians? A. I presume they do, yes.

Q. Don't you know, as a matter of fact, that they do?

A. I never saw that, not from records; I never read any orders or laws or anything. [23]

Q. You employed a union orchestra, didn't you?

A. We employed a leader with his orchestra.

Q. It was a union orchestra? A. Yes.

Q. It would be the minimum number of musicians in that orchestra, as required? A. Yes.

Q. Where had Bill Winder been playing before that time? A. I don't know.

(Testimony of J. M. Hooper.)

Q. And you prepared this sign for him?

A. I did.

Q. In the Senator Auditorium, which is owned by Seattle Aerie No. 1? A. Yes.

Q. You often lease out the auditorium to other organizations to hold dances, do you not?

A. Yes.

Q. And the money which you made upon the dances went to the Lodge? Is that true?

A. Yes.

Q. And you did from time to time get money from it, from the holding of these dances?

A. Sometimes we lost.

Q. And, of course, the loss was assumed by the Lodge? A. That is right.

Q. How long have you been a member of this Lodge? A. Since 1917.

Q. Well, 26 years, about? A. Yes.

Q. And they have been holding dances there the last thirty—the last 26 years, up until now, haven't they? [24] A. Intermittently, yes.

Q. Do you hold any public dances other than on Saturday nights? A. No.

Q. Did you ever engage an orchestra or leader whenever you do on other nights?

A. New Years nights.

Q. New Years nights? A. Yes.

Q. And you make the same arrangement with the leader as to the orchestra at that time?

Mr. Chavelle: I object to that. It is not material what they do on New Years eve. The only

(Testimony of J. M. Hooper.)

issue here is what they do with the people involved and the orchestra involved. Naturally, what they do on New Years eve or any other time is not involved here.

The Court: He may answer.

Q. (By Mr. Winter): As there are about four New Years involved in that——

A. Your question?

Q. There are four New Years involved in that, and do you employ the same orchestra leader or the same orchestra? A. The same orchestra.

Q. On New Years? A. Yes.

Q. And what time do you hold dances on that particular night?

A. From nine to about 2:30.

Q. Do you fix the time as to when you would open and close? [25]

A. Yes, we fix the time to open, and naturally we had to have a closing time. And so we fix it.

Q. Do you ever hold them after 2:30, when you had originally intended to hold them only until 10:30 on New Years? Do you? A. No.

Q. What time, as a rule, do you open and close on Saturday nights? A. Nine to 12:30.

Q. Is that the city ordinance in closing?

A. That is a matter of practice. They have a three and a half hour dance.

Q. How many dance numbers or dances do you have?

A. I never noticed how many they did have.

Q. They have some encores? A. Yes.

(Testimony of J. M. Hooper.)

Q. When they play for encores, then, it would be more numbers?

A. He lays out his own arrangement of music and plays it right straight through.

Q. Occasionally, when you became dissatisfied with the musicians and found the attendance falling off, you had the liberty of engaging a new orchestra, didn't you? A. At that time.

Q. And at that time you got Allen Stevens. Is that right? A. Arden Stevens.

Q. You never had a sign of Arden Stevens with "Ken Cloud" shown on it? A. Yes. [26]

Q. Is this the sign which you got for Arden Stevens?

A. That is the sign,—one of them.

Q. And then when Arden Stevens left and Ken Cloud took over, you changed it, struck out the words "Arden Stevens" and put "Ken Cloud" in there, and had it re-painted, didn't you?

A. At the direction of the leader, yes.

Q. This was your sign? A. Yes.

Q. Not compiled by the leader?

A. No, sir; we had to know the name of the orchestra.

Mr. Winter: I offer in evidence——

The Court: Under the same stipulation?

Mr. Chavelle: That is correct; the same as concerns the other sign.

Mr. Winter: We offer the sign, approximately the same sign, on which has been painted with large red letters: "Senator Ball Room" and then in black

(Testimony of J. M. Hooper.)

letters, smaller printing, "Where the Young People of Seattle Dance." "Dance" is in large black letters. And then the words "Every Saturday Night" in red letters, and then in smaller black letters, "The Music of"; and then in red letters "Ken Cloud's *Commandoes.*" When you refer to the words "Ken Cloud" that is painted over the words "Arden Stevens"?

Mr. Chavelle: Do you offer that?

Mr. Winter: Yes, I offer that.

The Court: Any objections?

Mr. Chavelle: No objection, your Honor.

The Court: It will be admitted.

The sign admitted in evidence and marked Defendant's Exhibit 4. [27]

Q. (By Mr. Winter): Now, you made compensation to both the leader, or as you contend in this case, to the contractor and the musicians, as fixed by the union. Is that it?

A. I presume it is.

Q. And the leader gets an addition, is it, of 10%, in this district? A. He does.

Q. How many members of the orchestra did you have? or how many members in the orchestra, were there in September, 1940?

A. Eight, as I remember.

Q. And the eight members of the orchestra included the leader or excluded the leader?

A. With the leader.

Q. And what was the rate for each musician, exclusive of the leader?

(Testimony of J. M. Hooper.)

A. The rate changed several times.

Q. Well, will you refer to this check?

A. Well, the leader figured it out himself and gave me the price.

Q. Well, don't you know?

A. I know what it was, yes.

Q. Well, what was it?

A. That time it was,—I think it was $9.00 per man.

Q. Nine dollars per man?

A. If I am not mistaken, eight times nine, I think.

Q. And how much was the amount of the check?

A. $89.10. But he had a singer also.

Q. He had a singer? A. Yes. [28]

Q. Were they under the union rules also?

A. I don't know.

Q. Did you have an agreement to pay $81.90 at that time?

A. We had an agreement to pay so much for the orchestra, and he told me how much it would be.

Q. You wouldn't know how much it would be?

A. He told me how much it would be, and I reported to the office how much it would be, so he could get his check for that amount.

Q. Now, you said the check was always made payable personally to the leader. Will you look at that check and tell the Court to whom it was made payable?

A. This one in particular is made to Arden Stevens Commodores.

(Testimony of J. M. Hooper.)

Q. What exhibit is that? A. No. 3.

Q. All right. Will you look at exhibit 2 and tell the Court to whom that check is payable?

A. Arden Stevens' Commodores.

Q. That is not payable to any one. It is payable to the whole orchestra?

A. Mr. Dowd made the checks. I didn't make them. He writes them.

Q. It is made to the whole orchestra, isn't it?

A. Made to Arden Stevens' Commodores.

Q. Do you have any other checks payable to the orchestra?

A. I don't know. All I did was hand the checks over.

Q. Do you have a cancelled check, or has your counsel any? [29]

A. I don't know. I don't think so, but I didn't make the checks.

Q. Do you have any other checks?

A. Yes, I have one made to Bill Winder. I think I have one for Ken Cloud.

Q. I hand you, Mr. Hooper, what has been marked for identificaton Defendant's A-1 and ask you to state what that purports to be?

A. That is one of the checks that went to Bill Winder, one of the checks given to Bill Winder.

Q. And what does it purport to be paid for?

A. Orchestra and singer.

Q. Referring to exhibit 2, what does that purport to be paid for? A. Orchestra.

Q. And exhibit 3? A. Orchestra.

(Testimony of J. M. Hooper.)

Q. What are the amounts in those respective checks, Exhibit 2? A. 89.10.

Q. And exhibit 3? A. 89.10.

Q. Now, the exhibit which has been marked for identification, that has on there "Orchestra and Singer", what is that for $93.10.

Q. There is a difference there, then, for the singer? A. Yes.

Q. And you say the union regulation was $9.00 per person? A. Yes. [30]

Q. Or the union rules or contract generally,—I guess it is better to put it that way—was $9.00 in the period covered by exhibit 3?

A. It was for quite a while. They furnished their own manager, and afterwards they changed.

Q. Afterwards they started billing you for it, did they?

A. Afterwards we paid the leader for an additional member of his orchestra, as manager.

Q. Did you want to have a singer there?

A. That was up to him. It wasn't up to us.

Q. You didn't make any arrangements whatsoever for him to have a singer there? A. No.

Q. He never discussed it with you?

A. No, that was up to him if he wanted to have a singer.

Q. Could he have had a singer that cost $100.00 there and you would have made no objection to it?

Mr. Chavelle: I object as repetition. He stated he had nothing to do with it; he said it was up to

(Testimony of J. M. Hooper.)

the leader whether there was a singer present in the orchestra.

The Court: Objection overruled.

The Witness: Will you read the question, please?

(Question read.)

A. We worked through him, yes.

Q. And you wouldn't have paid him for it, would you?

A. No, we wouldn't have paid him for it, that is true.

Q. What did you do as manager? What were your duties as manager of the dance?

A. It was up to me to see that the dances were conduct- [31] ed properly. I had police authority, and generally I was handling the public in a way that the people would want to come back again.

Q. Did the members of the Lodge or their friends who attended these dances occasionally request numbers to be played?

A. No, not to my knowledge.

Q. Did you discuss with either Mr. Ken Cloud, Mr. Stevens or Mr. Bill Winder, particularly when you put on these dances for the young people, as to whether they should play waltzes or anything of that nature?

A. No, they knew what kind of music to play. I didn't have to do that.

Q. You were the manager?

A. That is true, but the music was his business and not my business.

(Testimony of J. M. Hooper.)

Q. So you left the music up to him?

A. That is right.

Q. If he had played all waltzes you could have dispensed with his services, couldn't you?

A. Yes.

Q. If he had played all fox-trots, so that some of the members who were a little older like I am, and I went there, you could have dispensed with his services? A. Certainly.

Q. And in that sense, if it was necessary to control what music he was going to play, you could have done it, couldn't you, by dispensing with his services? A. Yes.

Q. And his orchestra? [32] A. Certainly.

Mr. Winter: I think that is all.

Re-direct Examination

By Mr. Chavelle:

Q. During the period involved here, relative to the engaging of an orchestra for those dances did you at any time have any dealings with the Musicians Union as to the salary to be paid or the hours to be played?

Mr. Winter: I object to that as repetition.

The Court: Objection overruled.

A. I had no contact with the union since I have had charge of the dances. I made the contract with the orchestra leader and the orchestra leader alone.

Q. All right, Mr. Hooper. It has already been brought out—the number of dances to be played in an evening. Did you have anything to do with that?

(Testimony of J. M. Hooper.)

A. No. We just set the hours and they made their own arrangement of music to last that number of hours.

Q. And at any time, to your knowledge, was any check made payable to any individual members of the orchestra in the period involved?

A. Oh, no. I know there was no check made to any individual member of the orchestra, other than the leader himself.

Mr. Chavelle: That is all.

Re-Cross Examination

By Mr. Winter:

Q. As a matter of fact, Mr. Hooper, unless the regulations—or under the union rules the leader of the orchestra is not responsible for the wages due —or supposed to be paid to the members of the orchestra, unless it was paid by the [33] principal, being the Lodge in question here?

A. I don't know anything about the union rules.

Q. You didn't know that was the union rule?

A. No.

Q. You wouldn't say it was not the union rule?

A. I don't know.

Q. (By the Court): Did you ever discuss with any one of the members of the orchestra the matter of their employment? A. No, sir.

Q. Or the hours they worked?

A. No, your Honor.

Q. Or the wages that they got?

A. No, your Honor, at no time.

(Testimony of J. M. Hooper.)

Q. Did you ever have to write their names, of the employees?

A. No, I didn't have, and I didn't even know their names at any time during that period.

Q. Did the rank and file of that orchestra membership change from time to time?

A. Well, it remained pretty steady. There were changes from time to time, but it remained pretty steady, the same employees.

Q. (By Mr. Winter): Ken Winder (Cloud?) played with the orchestra previous, before he left with the orchestra, didn't he? A. Yes.

Q. Then he came on as leader?

A. By agreement with Arden Stevens he took over.

Q. He replaced Ken Cloud? [34]

A. I don't know.

Q. Did they have the same number?

A. I wouldn't know who he replaced or——

Q. Did they have the same number?

A. They had the same number of men, yes.

Q. So you did replace him?

A. As far as I know; yes, they must have.

Q. Do you know whether he was a union musician? A. I don't know.

Q. It was 100% union?

A. Supposed to be, yes. I presume it was.

Q. You know, as a matter of fact, the Union would have been right after you if it hadn't been union? A. I suppose so.

(Testimony of J. M. Hooper.)

Re-Re-Direct Examination

By Mr. Chavelle:

Q. What were the circumstances under which Ken Cloud assumed leadership of the orchestra?

A. Arden Stevens was called to the service.

Q. Was that the reason?

A. That was the reason.

Witness excused.

FRANK DOWD,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Please state your full name. [35]

A. Frank Dowd.

Q. And what is your occupation, Mr. Dowd?

A. Secretary, Seattle Aerie No. 1.

Q. How long have you been secretary of Seattle Aerie No. 1?

A. Forty-one years and five months.

Q. When did you join the organization?

A. November 12, 1899.

Q. When was it founded?

A. February 6, 1898.

Q. So, for over forty years you have been secretary of Seattle Aerie No. 1?

A. Forty-one years.

Q. Forty-one years?

(Testimony of Frank Dowd.)

A. Over forty-one years.

Q. Now, during the years 1936, 1937, 1938, 1939, 1940 and 1941 did you have dances?

A. We did.

Q. And under whom were those dances?

A. Under J. M. Hooper as manager.

Q. Where were those dances held?

A. In the Eagles Auditorium or Senator Auditorium afterwards.

Q. Did you have anything to do with the engaging of the orchestra that played there?

A. Nothing whatsoever.

Q. Do you know how they were paid?

A. Paid by check.

Q. Did you draw the check?

A. I drew the checks on Fridays for the Saturdays following. [36]

Q. To whom were the checks made payable?

A. Made payable to the leader of the orchestra.

Q. Was the entire matter left up to Mr. Hooper as to engaging these orchestras?

A. He was the one that was authorized by Seattle Aerie No. 1.

Q. To engage this orchestra. A. He was.

Q. Referring to plaintiff's exhibit 2, would you state what that is?

A. That is the first check issued to Arden Stevens, to his dance orchestra.

Q. Who made that check out? A. I did.

Q. Is that your handwriting? A. Yes, sir.

Q. Was it signed by you? A. Yes, sir.

(Testimony of Frank Dowd.)

Q. And by whom else?

A. By Martin Robbins, Worthy President, and J. M. Davis, Treasurer.

Q. Is that the customary method that was used to pay the orchestra during 1936, 1937, 1938, 1939, 1940 and part of 1941? A. Always.

Q. Did you ever make any checks payable to any of the individual members of the orchestra?

A. None whatever.

Q. How did you determine these amounts that were inserted in these checks? How were those amounts determined? [37]

A. They were furnished by the leader or by the manager of the dance for that night.

Q. And who was that? A. J. M. Hooper.

Q. Are you still having dances in Seattle Aerie No. 1? A. We are.

Q. Was Mr. Hooper authorized by Seattle Aerie No. 1 at that time to conduct these dances and arrange for these dances? A. Yes, sir.

Q. Is it a fact or not that he had nothing to do with the orchestra, except to pay the leader?

Mr. Winter: We object to it. He is just leading the witness.

The Court: I think that question is leading.

Q. (By Mr. Chavelle) What, if anything, did you have to do with the orchestra?

A. Nothing.

Mr. Chavelle: That is all.

(Testimony of Frank Dowd.)

Cross Examinaton

By Mr. Winter:

Q. Mr. Dowd, in connection with the filing of your claim for refund, you made an affidavit and filed it with the Treasury Department, didn't you?

A. Yes, sir.

Q. I show you what has been marked for identification Government's Exhibit A-2 and ask you whether that is your signature appearing thereon, to the affidavit which you referred to?

A. It is my signature on that.

Q. Will you read it? [38]

(Witness reads paper.)

A. I have read enough of it to know what it is all about.

Q. That is your affidavit?

A. That is my affidavit, yes.

Mr. Winter: We will offer in evidence Defendant's Exhibit A-2.

The Witness: I would like to qualify. It is customary——

Mr. Winter: Just a minute!

Mr. Chavelle: Just one question.

Q. (By Mr. Chavelle): Did Seattle Aerie No. 1 authorize you to make that affidavit?

A. The question came up and I took it before the treasurer and the treasurer told me to go ahead and answer it as best I could.

The Court: I haven't seen it, but I will admit it in evidence anyway.

Mr. Winter: We offer it in evidence anyway.

(Testimony of Frank Dowd.)

Mr. Chavelle: I object as immaterial and not authorized.

The Court: It will be admited.

(The affidavit admitted in evidence and marked Defendant's Exhibit A-2.)

Q. (By Mr. Winter): Did Seattle Aerie No. 1 authorize you to make a claim for refund?

A. Yes, sir.

Q. They also authorized you to do anything necessary to get that refund, then, didn't they?

A. Yes, sir.

Q. And you thought this was necessary in order to get the refund through?

A. No. That was the custom we had had in the past. We [39] had been running dances for thirty years, on that basis. This was definitely generally arranged with the dance manager.

Q. You just gave it to the dance manager?

A. I gave it the customary way here in the past.

Q. Now, you arranged for a dance master or dance manager?

A. No, we had a dance manager all of that time.

Mr. Chavelle: No use browbeating the witness. Ask him questions one at a time.

Mr. Winter: That will be all.

Re-direct Examination

By Mr. Chavelle:

Q. Mr. Dowd, referring to the affidavit, what is the fact as to whether you are acquainted with the

(Testimony of Frank Dowd.)

operation of the dances, or the functions of the orchestra and the procedure in 1936, 1937, 1938, 1939, 1940 and the first quarter of 1941?

A. Yes.

Q. You were? A. Yes, sir.

Q. And in the affidavit, is that the way it was set up or was that prior to the time?

A. That is prior to the time.

Mr. Winter: I object to counsel leading the witness.

Mr. Chavelle: I asked him whether it was prior or not.

A. It was prior to that time.

Q. (By Mr. Winter): You sought to file and filed an affidavit in the claim for refund?

Mr. Chavelle: Now——

Mr. Winter: What has that to do——

Mr. Chavelle: Now, this has nothing to do with the claim for refund. I filed the claim for refund.

[40]

Mr. Chavelle: Any objection to that going in evidence?

Mr. Winter: None, except it is unnecessary. We stipulated that you filed a claim for a refund.

The Court: It will be admitted in evidence.

(The affidavit admitted in evidence and marked Plaintiff's Exhibit 5.)

(Witness excused.)

Mr. Chavelle: The plaintiff rests, on this Seattle No. 1 Aerie case.

Mr. Winter: We have no evidence. We rest.

The Court: Do you have others of these five cases that are similar in nature, except as to the amounts, to the Seattle case?

Mr. Winter: One more.

The Court: Which one is that?

Mr. Chavelle: The Ballard case. I think it was stipulated before we came to court that Tacoma and Olympia may be passed for the reason we filed these three cases we are trying here, which will determine all the issues involved in those cases?

The Court: Tacoma and Olympia?

Mr. Chavelle: Yes. They raise the same issues as the Aberdeen.

Mr. Winter: We think they raise the same issues.

The Court: Well, does that conclude the evidence you want to offer for the consideration of the Court and the record?

Mr. Winter: One more case.

Mr. Chavelle: The Ballard case. [42]

The Court: Does it turn upon the question of independent contractor?

Mr. Chavelle: Yes, the same question.

Mr. Winter: It involves, in addition, the fact, —That is as to the conflict of the testimony with respect to the members employed in that, whose status is in question.

The Court: Well, it is too late to begin that, so I believe we will adjourn and reconvene at 9:45 in the morning. Can you get here from Seattle at that time?

Mr. Chavelle: Yes, your Honor.

The Court: That will be satisfactory.

(Whereupon an adjournment was taken until May 26, 1943, at which time the trial resumed, as to Case No. 510.)

Mr. Winter: I would like to file with the Court the schedule we agreed upon and the names of the employees and the amount of the payment.

FRED THROLACKSON,

A witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your name, please?

A. Fred Thorlackson.

Q. What is your occupation?

A. Secretary of the Ballard Eagles.

Q. How long have you been secretary of the Ballard Eagles?

A. Approximately five years, with an absence of five months. [43]

Q. Did you during the year 1936 have a musician who rendered services for you?

A. That was before I took office.

Q. Were you a member of the Ballard Eagles at that time?

A. Yes, there was a musician there.

Q. Will you explain briefly how the musician becomes a part of the organization?

(Testimony of Fred Thorlackson.)

A. How he becomes a part of it?

Q. Yes.

A. He is appointed by the Worthy President.

Q. And would you outline briefly his duties?

Mr. Winter: If he knows. Or, is it provided in the constitution? If his duties are provided for in the constitution, I believe that would be the best evidence.

Mr. Chavelle: No, there is nothing in the constitution about it. Go ahead.

Q. (By Mr. Winter): Do you know?

A. Yes.

Q. (By Mr. Chavelle): What are the duties of the musician?

A. He plays for the opening ceremonies, during the initiation, and the closing of the meeting in ritualistic work.

Q. Plays the piano? A. That is right.

Q. What compensation does he receive per year?

A. I don't know what he received at that time.

Q. What does he receive generally now?

A. $2.50 per meeting.

Q. During the year 1936 did you employ any physician in the Ballard Aerie?

A. Yes, I believe there were. [44]

Q. How are they selected under the constitution? The same way they are in these other aeries?

A. That is right.

Q. Who were your physicians in 1936, 1937, 1938 and 1939?

A. I believe there was a change there.

(Testimony of Fred Thorlackson.)

Mr. Winter: If the Court please, the schedule which we stipulated has that set forth therein, Dr. Megard and Dr. Norgard.

Q. (By Mr. Chavelle): Doctor Megard and Dr. Norgard in 1936?

A. I believe that is right.

Q. Did Dr. Megard have his office in Ballard?

A. Yes.

Q. And was Dr. Norgard's office in Ballard?

A. It was.

Q. Did they perform their duties under the constitution in your aerie? A. That is right.

Q. Did you have any privilege of controlling the doctors at the time? A. No.

Q. In no way?

Mr. Winter: That is repetition.

The Court: It is not in this case, but it might be stipulated that the physicians, in reference to this Ballard Aerie are the same as they are in the Aberdeen Aerie.

Mr. Winter: It may be so stipulated.

Mr. Chavelle: Yes, that is agreeable.

Q. In 1937 what did you pay your musician, do you recall? [45]

A. I believe it was $2.00 per meeting.

Q. And was the compensation of the trustees fixed by the constitution? A. No.

Q. What did you pay your trustees during the years 1936, 1937, 1938 and 1939?

A. I believe if I am correct there wasn't any change, $12.00 per year.

(Testimony of Fred Thorlackson.)

Q. In 1938 can you tell me what physicians you had? A. I believe the same.

Q. In 1938 what position did Paul Fisher have?

A. He was Worthy President.

Q. Henry Voss and H. King.

A. I believe trustee.

Q. And E. Swartout? A. Musician.

Q. E. C. Collier? A. Junior or Senior?

Q. Senior. A. Was that 1938?

Q. 1938.

A. He was treasurer for part of that time.

Q. And Dr. Megard and Dr. Eggers, were they your two Aerie Physicians during that year?

A. Dr. Megard was for the entire year and Dr. Eggers was for a part of the year.

Q. Arthur Rosenfield? E. Sanger? Who are they? A. They were trustees.

Q. At that time? A. Yes. [46]

Q. C. A. Sundberg, what was his position in 1938?

A. He had no position, not C. A.

Q. Do you remember the auditing committee during that period, then?

A. Yes. He probably was on the auditing then.

Q. Is the auditing committee's compensation fixed by the constitution? A. No, it is not.

Q. Do you know what they are paid, if anything?

Mr. Winter: I object to it as incompetent, irrelevant and immaterial.

(Testimony of Fred Thorlackson.)

The Court: The objection will be overruled.

A. I don't remember just exactly what the compensation was, Mr. Chavelle.

Q. (By Mr. Chavelle): What is it now? Do you know what it was in 1939? Was it a non-compensation job?

A. That is at the jurisdiction of the Aerie, of the members.

Q. What has your aerie done? What position did your aerie take with reference to the auditing committee, so far as compensation was concerned?

A. We pay them now.

Q. What do they receive?

A. I think it is $1.00 per month.

Q. Now, there was an E. C. Steele in 1938. What was his position?

A. Treasurer for a part of the term.

Q. And E. Trambley, what was his position?

Mr. Winter: Do you mean now?

Mr. Chavelle: In 1938. [47]

A. At that time he was probably Inside Guard. I am not certain.

Q. What are the duties of an inside guard?

A. The Inside Guard's duties are partly ritualistic, in the governing of the door, the entrance to the Lodge hall.

Q. And when does he appear on his job?

A. Just before the opening of the meeting.

Q. How often do you meet at the Ballard Aerie No. 172? A. Each Tuesday evening.

(Testimony of Fred Thorlackson.)

Q. Now, there is an Earl Dreshel. What was his position during 1938?

A. He was one of our stewards.

Q. That meant he worked in the club room?

A. Yes.

Q. Earl Anderson?

A. Worked in the club room.

Q. James E. Anderson?

A. Worked in the club room.

Q. Steven R. Renbrill? A. Janitor.

Q. Jack Smith?

Mr. Winter: All the rest of them work in the social room?

Mr. Chavelle: I am not sure of that.

A. Jack Smith I believe worked in the club room.

Q. And J. Cosgrove,—John Cosgrove.

A. I don't know exactly what his duties were at that time, whether he was in the club room or not.

Q. Do you pay your physician, under the constitution, 50 cents per member?

A. That is correct. [48]

Q. Per quarter? A. Yes.

Mr. Chavelle: I believe it is stipulated as to what the Aerie Physican received in 1936?

Mr. Winter: Yes, the sheet which we have filed shows the wages paid, the amount paid, to each of the individuals involved in the statement, if the Court please.

The Court: For a period of how long a time?

(Testimony of Fred Thorlackson.)

Mr. Winter: For 1936, 1937, 1938 and 1939.

The Court: That is paid throughout the whole year.

Mr. Chavelle: Yes, that represents the entire year. Your Honor will notice the names of the other individuals which are not possibly in the social department. Under the complaint or claim for refund the amounts are not put in there for the obvious reason it becomes immaterial. Your Honor will notice here for instance, 1937, after the word "Treasurer, $8.00" we have put a note at the end of the exhibit. This amount was paid to this individual, which was claimed in the claim, in the complaint, but not in the claim for refund, which becomes a matter of argument, of law, as to whether or not the plaintiff can recover with respect to their enumerations, when they have mentioned it in their claim for refund.

Does your Honor understand what I am getting at?

The Court: Yes, I do. I don't understand how you enumerate three who had no compensation.

Mr. Winter: None was paid to them. That is the amount paid to the three, all of them.

The Court: It would follow logically there would be no claim for refund. [49]

Mr. Winter: But the question might arise whether they had eight or more.

The Court: As to whether they would be employees?

(Testimony of Fred Thorlackson.)

Mr. Winter: That is right. But you could not, —we contend the Court may consider them because they were not on the claim for refund as not having been included and employed.

Q. (By Mr. Chavelle): Do you pay a Federal income tax, Ballard Aerie No. 172?

A. We do not.

Q. Did you pay a Federal Income tax for the years 1936, 1937, 1938 and 1939?

A. We did not.

Q. I will ask you if the ritualistic officers referred to here are generally engaged in a regular and steady occupation?

A. They have work as far as to my knowledge.

Mr. Chavelle: I believe that is all.

Mr. Winter: I have no questions.

Q. (By the Court): How many of these, in these years 1936, 1937, 1938 and 1939, which this list names, were ritualistic officers as distinguished from employees?

Mr. Chavelle: I big your pardon?

The Court: I would like to get some information as to how many of these were ritualistic officers in those years.

Mr. Chavelle: They are not.

The Court: But their positions are not indicated on here.

Mr. Chavelle: In this 1938 it is.

The Court: Take 1936.

Mr. Chavelle: Are you referring to that? [50]

(Testimony of Fred Thorlackson.)

The Court: They are indicated in 1937. They are indicated there, but when you get to 1938——

Mr. Chavelle: I don't remember that.

Mr. Winter: I want to point out that all of these individuals filed except the ten are admitted employees, except those which have been recited in the claim for refund.

Mr. Chavelle: May we clear that?

Q. (By Mr. Chavelle): Paul French, during the year 1938, what position did he occupy in Ballard Aerie No. 172?

A. 1938, Worthy President.

Q. H. Foss, what position did he occupy?

A. Treasurer.

Q. Their compensation was fixed by the constitution? A. That is correct.

Q. Do you know whether Paul Fisher received any compensation in 1938? A. I do not.

Q. Do you know whether Henry Voss received any compensation in 1938? A. I don't recall.

Q. And E. C. Collier, what was his position in 1938? A. Treasurer.

The Court: I thought you said Foss was treasurer.

The Witness: Well, may I clarify that?

Mr. Chavelle: Yes, explain it.

A. Your Honor, during the year of 1938—Our year begins June 1,—I think E. C. Collier went out prior to June 1 and—No, Voss was a trustee, was he not? Excuse me. At that time I was a trustee and E. C. Collier was treasurer.

(Testimony of Fred Thorlackson.)

Q. T. J. Helser? A. Secretary. [51]

Q. T. T. Gullickson? A. Secretary.

Q. E. Sater? A. Musician.

Q. What compensation did he receive in 1938?

A. Two dollars each meeting.

Q. You met once a week? A. Yes.

Q. E. C. Megard? A. Physician.

Q. R. Wggers? A. Physician.

Q. O. Rovenow? A. Trustee.

Q. What compensation did the trustee receive?

A. I don't recall that he received any, whether they took any.

Q. Is it provided for in the constitution?

A. I believe it was a compensation of $12.00 a year.

Q. E. Sigler?

Mr. Winter: We have stipulated that the record shows.

Mr. Chavelle: It doesn't show on the schedule who they are.

The Court: The Court has asked for it.

Mr. Winter: We will stipulate that they were paid, though. I think that is a fact.

Q. E. Sigler? A. For 1938?

Q. Yes, 1938. A. Trustee. [52]

Q. Henry Frederick? A. Trustee.

Q. Earl Dresher?

A. Club Room employee.

Q. W. O. Peterson?

A. Club Room Employee.

(Testimony of Fred Thorlackson.)

Q. Carl Anderson?

A. Club Room Employee.

Q. P. E. Anderson?

A. Club Room employee.

Q. S. Rennick? A. Janitor.

Q. C. A. Winder?

A. Auditing Committee.

Q. What was his compensation?

A. I don't recall.

Q. Fixed by the constitution? Or is it up to the individual aerie? A. Up to the aerie.

Q. Jack Smith? A. Club Room employee.

Q. E. R. Steel? A. Treasurer.

Q. J. Cosgrove?

A. I think he was in the social room at that time.

Q. P. McIntire?

A. Club Room employee.

Q. Paul Fisher? A. Worthy President.

Q. E. E. Trombley? [53]

A. Inside Guard.

Q. Or Outside Guard?

A. Outside Guard, I meant.

The Court: Well, did you just have one member of that auditing committee? Or did you have a committee?

A. No. At that time I believe there was just one member, your Honor.

Q. As to the Outside Guard, he was a ritualistic officer? A. Yes.

(Testimony of Fred Thorlackson.)

Q. Now, did Paul Fisher occupy two positions?

A. No, he was the Worthy President.

The Court: He appears twice on this list for 1938.

Q. (By Mr. Chavelle): Was he president in 1937?

A. I believe he was. He took over the term of the previous president, who had not finished his term.

Q. That is the reason for the duplication?

A. I believe so, yes.

Q. So he served part of 1937 and all of 1938 as President? A. That is correct.

Q. When does he take office?

A. June first.

Q. June first of each year? A. Yes.

Mr. Chavelle: Does that answer your Honor's question?

The Court: Well, in part. He should be counted in that tabulation for two instead of one. As he explained something there, it will be held as a matter of law that they were employees. He is on there twice.

Q. (By Mr. Chavelle): Explain why he was on there twice. [54]

Mr. Winter: We can explain it.

The Court: Why was it?

Mr. Winter: Because he was paid out of the social fund. We have witnesses who examined their books. He was paid substantially out of the

(Testimony of Fred Thorlackson.)

social fund as an employee during a part of the year. Don't you recall that?

The Court: Paid out of the social fund?

Mr. Winter: Yes.

The Witness: Well, in order to clarify that, I might say that was the first year I was the secretary, and we have three funds and there was nobody there to teach me all the rules and regulations of the books, which are strenuous themselves, and I paid different checks out of different funds, which were not supposed to have been paid, so far as the regulations are concerned.

Q. (By Mr. Chavelle): Isn't it a fact that Paul Fisher's only occupation was physician during 1938?

Mr. Winter: Did you finish?

A. Yes. As far as I know that is absolutely correct.

Q. (By Mr. Chavelle): How much did you pay him out of each fund? How much compensation was he supposed to get?

A. Four dollars per year.

Q. (By Mr. Winter): The social fund is the amount kept for the bar-room and the other social activities? A. Generally speaking, yes.

Q. Cigar fund, and everything you sold there in the club? A. That is right.

Q. You have all of these employed in the social room? A. Yes.

Mr. Chavelle: That is all.

Witness excused. [55]

E. R. STEELE,

a witness on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you please state your name?

A. E. R. Steele.

Q. Where do you reside?

A. 1521 West 60th, Seattle, Washington.

Q. Are you a member of the Seattle Aerie?

A. I am.

Q. Are you a member of Ballard Aerie No. 172?

A. Yes.

Q. How long have you been a member of Ballard Aerie No. 172?

A. Practically ten years.

Q. During the year 1938 did you hold any official position in Ballard Aerie 172?

A. Starting in June, yes, I was elected treasurer.

Q. In 1939 did you hold any position?

A. Treasurer.

Q. In 1938 do you recall what compensation you received from Ballard Aerie, if any?

A. The amount of $1.00 a month.

Q. The amount of $1.00 a month?

A. Yes.

Q. In 1939 you testified you were treasurer. What compensation did you receive?

A. I believe it was still $1.00 a month.

Q. Where did you perform your duties as treasurer? [56]

(Testimony of E. R. Steele.)

A. At home sometimes, and also I have certain duties that have to be performed at the lodge hall, but a certain amount of my work I can do at my home.

Q. Are you regularly employed?

A. Yes, I am.

Q. How much time do you devote to the job?

A. In my regular employment?

Q. No. I meant the regular employee as an officer of the aerie. Is that your only job?

A. No, sir.

Q. How much time do you devote to the duties of treasurer?

A. Oh, I would say,—I would imagine it would involve perhaps only a total of about six hours during a month I would imagine.

Q. Are there any duties that you perform in connection with the job of treasurer that you perform in the aerie room proper?

A. Only to the extent that I keep a monthly report as to the financial standing of the lodge.

Q. Do you wear any regalia, or classification as such?

A. Yes, I have a part of the regalia of the officers of the Lodge.

Q. Do you have a chair which you occupy during meetings? A. I do.

Mr. Chavelle: I believe that is all.

(Testimony of E. R. Steele.)

Cross Examination

By Mr. Winter:

Q. I take it, Mr. Steele, that you perform all the duties required under the constitution of the aerie? Is that right? [57] A. That is right.

Q. And they are prescribed in the constitution, what you are supposed to do?

A. That is right.

Q. And you are elected to the office in June of each year? A. Yes, sir.

Q. And you are still an officer? A. Yes.

Q. (By the Court): What is your occupation?

A. Pipe man for the city of Seattle Water Department.

Q. And you have been engaged in that occupation about how long? A. About ten years.

Q. Are you on civil service status with the city?

A. Yes, sir.

The Court: That is all.

Witness excused.

Mr. Chavelle: We would like to have these claims for refund marked for identification. These are offered, claims for refund in the Ballard 171 case. If there is no objection by counsel for the Government I will introduce them in evidence.

Mr. Winter: No objection.

The Court: They will be admitted.

The claims for refund admitted in evidence and marked Plaintiff's exhibit 1, 2, 3 and 4.

Mr. Chavelle: That is our case. [58]

The Court: Do you have any more witnesses?

Mr. Winter: May I ask whether the stipulation was received in evidence with respect to this Ballard case?

(No response from any one.)

Mr. Winter: That will be all, I think, your Honor.

Whereupon the case was argued at length by the respective counsel.

Case closed.

[Endorsed]: Filed Jan. 29, 1944. [59]

[Endorsed]: No. 10686. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, a corporation, Appellee, and United States of America, Appellant, vs. Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed February 17, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10686

UNITED STATES OF AMERICA,

Appellant,

vs.

ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON

Now Comes the United States of America, appellant in the above-entitled cause, and files the following statement of points to be relied upon in the prosecution of this appeal in the above-named case from the judgment of the District Court of the United States for the Western District of Washington entered on September 14, 1943.

1.

The appellee had in its employment the following individuals as employees for purposes of Title VIII of the Social Security Act and Sub-chapter A of Chapter 9 of the Internal Revenue Code during the periods indicated:

Physician	1938 through Sept. 30, 1941
President	1938 and 1939
Vice President	1938
Treasurer	1938 and 1939
Trustees	1938 through 1939

2.

The individuals named in paragraph 1 for the periods and purposes there stated were not excluded from the employment of appellee on the ground that they were officers whose duties and activities were exclusively ritualistic.

3.

The physician named in paragraph 1 for the period and purposes there stated was not excluded from the employment of appellee on the ground that the physician was an independent contractor.

Wherefore, appellant prays that said judgment may be reversed and that such other and further relief may be granted as to this Court may seem just and proper.

J. CHAS. DENNIS
United States Attorney.
HARRY SAGER
Assistant United States Attorney.
THOMAS R. WINTER
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Copy received this 17th day of January, 1944.
CORNELIUS C. CHAVELLE
Attorney for Appellee

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 17, 1944. Judson W. Shorett, Clerk. By ER, Deputy.

[Endorsed]: Filed Feb. 17, 1944. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10686

UNITED STATES OF AMERICA,
Appellant,

vs.

BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES,
Appellee.

STATEMENT OF POINTS TO BE RELIED UPON

Now Comes the United States of America, appellant in the above-entitled cause, and files the following statement of points to be relied upon in the prosecution of this appeal in the above-named case from the judgment of the District Court of the United States for the Western District of Washington entered on September 14, 1943.

1.

In addition to five others whose status is conceded to be that of employees for purposes of Title IX of the Social Security Act, the appellee had in its employment the following individuals as employees for purposes of Title IX of the Social Security Act during the periods indicated:

	1936	1937	1938	1939
Physicians	2	3	2	2
Treasurer	1	—	1	1
Musician	1	1	1	1
Total	4	4	4	4

2.

The individuals named in paragraph 1 for the periods and purposes there stated were not excluded from the employment of appellee on the ground that they were officers whose duties and activities were exclusively ritualistic.

3.

The physicians named in paragraph 1 for the period and purposes there stated were not excluded from the employment of appellee on the ground that they were independent contractors.

Wherefore, appellant prays that said judgment may be reversed and that such other and further

relief may be granted as to this Court may seem just and proper.

J. CHAS. DENNIS
United States Attorney.
HARRY SAGER
Assistant United States Attorney.
THOMAS R. WINTER
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Copy received this 17th day of January, 1944.
CORNELIUS C. CHAVELLE
Attorney for Appellee

[Endorsed]: Filed in the United States District Court. Western District of Washington, Southern Division. Jan. 17, 1944. Judson W. Shorett, Clerk. By ER, Deputy.

[Endorsed]: Filed Feb. 17, 1944. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10686

UNITED STATES OF AMERICA,
Appellant,

vs.

ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, a corporation,
Appellee.

No. 10686

UNITED STATES OF AMERICA,
Appellant,

vs.

BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES, a corporation,
Appellee.

STIPULATION FOR DESIGNATION OF RECORD FOR PRINTING

The above-entitled causes having been consolidated for trial in the lower District Court and the appellant and appellees having, through their respective attorneys, stipulated that the records in the above-entitled causes be consolidated on appeal for the purpose of the record, argument, briefing, opinion and judgment, now, hereby, stipulate and designate the entire transcript of the record, as prepared and

certified by the Clerk of the United States District Court for the Western District of Washington, as necessary for the consideration of these appeals and the whole thereof be printed, except all exhibits certified in their original form and particularly Exhibit 6 in District Court Cause No. 459, being the Constitution for Subordinate Aeries, Fraternal Order of Eagles, be not printed, the right being reserved to either of the parties and the court to refer to them for all purposes as though they did appear in the printed record.

Dated this 24th day of Jan., 1944.

J. CHAS. DENNIS
United States Attorney.
HARRY SAGER
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No. 10686

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
v. *Appellant*
ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, a corporation,
and *Appellee*
UNITED STATES OF AMERICA,
v. *Appellant*
BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES, a corporation, *Appellee*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. CHARLES H. LEAVY, *Judge*

BRIEF FOR THE UNITED STATES

J. CHARLES DENNIS,
United States Attorney.

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INDEX

page

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 4

STATUTES AND REGULATIONS INVOLVED 4

STATEMENT 4

STATEMENT OF POINTS TO BE URGED.... 7

SUMMARY OF ARGUMENT..... 8

ARGUMENT:

I. A statement of the individuals whose status is involved in these cases.... 9

II. The taxpayers are not exempt from social security tax by virtue of their being fraternal organizations..... 13

111. Services which are exclusively ritualistic are excluded from the term "employment". 16

IV. Services performed by the president, vice president, treasurer, trustees, and musician are not exclusively ritualistic so as to be excluded from the term "employment". 20

V. The Aerie physicians are within the term "employment" since they perform services as employees for taxpayers. 28

CONCLUSION 43

APPENDIX A..... 44

APPENDIX B 52

CITATIONS

CASES:

page

American Legion v. Reynolds, decided August 12, 1943 25

Beaverdale Memorial Park v. United States, 47 F. Supp. 663 34

Builders' Club of Chicago v. United States, 58 F. (2d) 503 19

Builders Lumber & Supply Co. v. United States, 48 F. Supp. 241 34

Deecy Products Co. v. Welch, 124 F (2d) 592.. 35

Dorfman's Jewelry Store v. United States, decided February 13, 1943..... 37

First State Bk. & Tr. Co. v. United States, decided July 2, 1943 37

Fosgate, Chester C., Co. v. United States, 125 F. (2d) 775, certiorari denied, 317 U.S. 639.... 15

Hassett v. Associated Hospital Service Corp. 125 F. (2d) 611 14

Independent Petroleum Corp v. Fly, 141 F. (2d) 189 39

Jackson County State Bank v. United States, decided April 16, 1943 37

Nicholas v. Richlow Mfg. Co., 126 F. (2d) 16 26, 33

Robbin Goodfellow, The, 20 F. (2d) 924..... 19

San Antonio Trunk Co. v. United States, decided July 1, 1941 37

United States v. Felt & Tarrant Co., 283 U. S. 269 11

United States v. Griswold, 124 F. (2d) 599.... 38

Wells Fargo Bank & Union Trust Co. v. McLaughlin, 78 F. (2d) 934, certiorari denied 296 U. S. 638 16

STATUTES:

page

Internal Revenue Code:

Sec. 101 (26 U.S.C. 1940 ed., Sec. 101) .. 13, 14
Sec. 1400 (26 U.S.C. 1940 ed. Sec. 1400) 46
Sec. 1400, as amended (26 U.S.C. 1940 ed., Sec. 1400) 46
Sec. 1410 (26 U.S.C. 1940 ed., Sec. 1410) 47
Sec. 1410, as amended (26 U.S.C. 1940 ed., Sec. 1410) 47
Sec. 1426 (26 U.S.C. 1940 ed., Sec. 1426) 14, 16, 17, 47, 48
Sec. 1426, as amended (26 U.S.C. 1940 ed., Sec. 1426) 47, 48
Sec. 1600 (26 U.S.C. 1940 ed., Sec. 1600) 17
Sec. 1607 (26 U.S.C. 1940 ed., Sec. 1607) ..14, 17

Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 101 13

Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 101 13

Social Security Act, c. 531, 49 Stat. 620..... 44
Sec. 801 (42 U.S.C. 1940 ed., Sec. 1001) 44
Sec. 804 (42 U.S.C. 1940 ed., Sec. 1004) ..17, 44
Sec. 811 (42 U.S.C. 1940 ed., Sec. 1011) 14, 17, 44, 45
Sec. 901 (42 U.S.C. 1940 ed., Sec. 1101) ...17, 45
Sec. 907 (42 U.S.C. 1940 ed., Sec. 1107) 17, 45, 46
Sec. 1101 (42 U.S.C. 1940 ed., Sec. 1301) 26, 33, 34, 46

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360..... 14, 46
Sec. 606 (26 U.S.C. 1940 ed., Sec. 1426) .. 14, 48
Sec. 614 (26 U.S.C. 1940 ed., Sec. 1607) 14

MISCELLANEOUS:

page

Bouvier's Law Dictionary (3d Rev.), Vol. 2, p. 1527 19

C.T. 15, 1939-1 Cum. Bull. 318..... 42

C.T. 18, 1939-2 Cum. Bull. 295..... 42

Mim. 4880, 1939-1 Cum. Bull. 312.....18, 32

S.S.T. 86, 1937-1 Cum. Bull. 462..... 42

S.S.T. 240, 1937-2 Cum. Bull. 403..... 42

S.S.T. 291, 1938-1 Cum. Bull. 416..... 41

Treasury Regulations 90, Art. 205.....33, 48

Treasury Regulations 91, Art. 3.....33, 49

Treasury Regulations 106, Sec. 402.204 33, 51

Treasury Regulations 107, Sec. 403.204..... 33

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. CHARLES H. LEAVY, *Judge*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 73-85) is not reported.[1]

[1] This opinion has reference to the two cases here involved and that of *Seattle Aerie No. 1 of the Fraternal Order of Eagles v. Clark Squire, Collector of Internal Revenue of the United States* in which latter case no appeal has been taken. It has been stipulated that the cases here involved be consolidated for purposes of appeal. (R. 114.)

JURISDICTION

The appeal in the Aberdeen Aerie case involves an action under Section 3772 of the Internal Revenue Code for the recovery of social security taxes paid subsequent to April 1, 1938 (R. 87), with respect to 1938 through September 30, 1941, under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code. Within four years of such payment, as provided by Section 3313 of the Internal Revenue Code, on January 23, 1942 (R. 87-88), claims for refund of a portion of the taxes so paid were filed with the Collector of Internal Revenue. On October 1, 1942, these claims for refund were disallowed in full by the Commissioner of Internal Revenue. (R. 91.) Within two years of such disallowance, as provided by Section 3772 (a) (2) of the Internal Revenue Code, this action was commenced on November 5, 1942. (R. 21-40.) Jurisdiction of this action was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. Judgment of the District Court was entered on September 14, 1943 (R. 102-103), and notice of appeal was filed on December 10, 1943 (R. 108). Jurisdiction of this Court is invoked by virtue of Section 128 (a) of the Judicial Code, as amended.

The appeal in the Ballard Aerie case involves an

action under Section 3772 of the Internal Revenue Code for the recovery of social security taxes paid on March 4, 1941 (R. 95), with respect to 1936 through 1939 under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code. Within four years of such payment, as provided by Section 3313 of the Internal Revenue Code, on July 16, 1941 (R. 95), claims for refund of the taxes so paid were filed with the Collector of Internal Revenue. On September 6, 1941, the claims for refund with respect to 1936, 1938, and 1939 were disallowed in full by the Commissioner of Internal Revenue. (R. 95-96.) On March 25, 1942, the claim for refund with respect to 1937 was disallowed in full by the Commissioner of Internal Revenue. (R. 96.) Within two years of such disallowance, as provided by Section 3772 (a) (2) of the Internal Revenue Code, this action was commenced on November 4, 1942. (R. 2-21.) Jurisdiction of this action was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. Judgment of the District Court was entered on September 14, 1943 (R. 100-101), and notice of appeal was filed on December 10, 1943 (R. 109-110). Jurisdiction of this Court is invoked by virtue of Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

Aberdeen Aerie Case

Whether the physician, president, vice-president, treasurer, and trustees, of the Aberdeen Aerie were in the employment of that organization under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code.

Ballard Aerie Case

Whether the physicians and treasurer of the Ballard Aerie and a musician performing services for it were in the employment of that organization under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp.

STATEMENT

Aberdeen Aerie Case

This is an action commenced by the Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, hereinafter sometimes referred to as taxpayer, for the recovery of taxes paid under Title VIII of the Social Security Act and of Chapter 9A of the Internal Revenue

Code. Taxpayer is a fraternal organization created under the laws of the State of Washington relative to such organizations. (R. 87.)

Taxpayer filed original and supplementary quarterly returns under Title VIII of the Social Security Act and under Chapter 9A of the Internal Revenue Code and paid taxes thereon as follows (R. 87):

	1938	$53.08
	1939	59.02
	1940	57.84
January 1,	1941 to	
September 30,	1941	47.51

On January 23, 1942, taxpayer filed separate claims for refund of these taxes for the years and in the amounts as follows (R. 87-88):

	1938	$19.24
	1939	22.81
	1940	19.20
January 1,	1941 to	
September 30,	1941	8.86

These claims for refund were based generally on taxpayer's contention that its Aerie physician and certain of its officers were not in its employment for purposes of this tax. (R. 65-68.)

On October 1, 1942, taxpayer's four claims for refund were disallowed. (R. 91.) The present action was commenced on November 5, 1942. (R. 40.)

Ballard Aerie Case

This is an action commenced by the Ballard Aerie No. 172 of the Fraternal Order of Eagles, hereinafter sometimes referred to as taxpayer, for the recovery of taxes paid under Title IX of the Social Security Act and of Chapter 9C of the Internal Revenue Code. Taxpayer is a fraternal organization created under the laws of the State of Washington relative to such organizations. (R. 95.)

On January 17, 1941, taxpayer filed its annual returns under Title IX of the Social Security Act and under Chapter 9C of the Internal Revenue Code for the periods indicated and on March 4, 1941, paid taxes with respect thereto as follows (R. 95):

1936	$ 18.68
1937	98.44
1938	393.82
1939	310.79

On July 16, 1941, taxpayer filed separate claims for refund of the amounts of tax above indicated, on the ground that during these years it was not an employer of eight or more individuals; that its Aerie physicians, certain of its officers, and a musician were not in its employment; that, consequently, it was not subject to this tax. (R. 95.)

The claims for refund with respect to 1936, 1938,

and 1939 were denied on September 6, 1941. The claim for refund with respect to 1937 was denied on March 25, 1942. (R. 95-96.)

Pursuant to a certificate of overassessment, on or about April 15, 1942, there was refunded to taxpayer $232.92 with respect to its taxes for 1938, and $157.70 with respect to its taxes for 1939. The result of these refunds was to reduce the net amount of taxes paid by taxpayer for 1938 to $160.90 and that paid for 1939 to $153.09. (R. 96.) The present action for the recovery of the remainder of the refunds claimed by taxpayer was commenced on November 4, 1942. (R. 21.)

STATEMENT OF POINTS TO BE URGED

Aberdeen Aerie Case

1. Taxpayer's physician, president, vice president, treasurer, and trustees were in its employment for purposes of Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code.

2. These individuals were not excluded from the employment of taxpayer on the ground that they were officers whose duties and activities were exclusively ritualistic.

3. The physician was not excluded from the

employment of taxpayer on the ground that he was an independent contractor.

Ballard Aerie Case

1. Taxpayer's physicians and treasurer and a musician performing services for it were in its employment for purposes of Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

2. These individuals were not excluded from the employment of taxpayer on the ground that they were officers whose duties and activities were exclusively ritualistic.

3. The physicians were not excluded from the employment of taxpayer on the ground that they were independent contractors.

SUMMARY OF ARGUMENT

The exemption from social security tax extended to non-profit organizations by the Social Security Act Amendments of 1939, effective January 1, 1940, has no application to these cases.

The term "employment" does not include services which are exclusively ritualistic. In determining whether services are exclusively ritualistic, administrative services are to be ignored but only if: (1) They

are connected with ritualistic services; (2) they are subordinate to ritualistic service; and (3) they are uncompensated.

Services rendered by the president, vice-president, treasurer, trustees, and musician for the taxpayers are not within the definition of exclusively ritualistic service so as to be excluded from the term employment. The services so rendered by the musician were performed by him as an employee rather than an independent contractor. The provisions exempting casual labor from the social security tax have no application to this musician.

Services performed for the taxpayers and their members by the Aerie physicians were rendered by them as employees and not as independent contractors.

ARGUMENT

I

A STATEMENT OF THE INDIVIDUALS WHOSE STATUS IS INVOLVED IN THESE CASES

Aberdeen Aerie Case

This action involved liability for tax on employers and employees imposed under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code. Difficulty is experienced in determining from

the record in this case the individuals whose status is properly in issue and the periods involved in such issue.

The claims for refund for 1938 and 1939 (R. 88-89) refer to one physician, "trustees and ritualistic officers," without naming the particular offices. However, the proper names of certain individuals are stated and from the offices held by these, the offices intended to be placed in issue have been determined. In this manner it has been ascertained that the claims for refund for 1938 and 1939 refer to a conductor. No mention of this office is made in the complaint.

The complaint in this action does not coincide with the claims for refund on which it is based. For all four periods the complaint refers to two physicians. (R. 23, 28, 32, 36.) Only one physician is mentioned in the claims for refund. For all four periods the complaint refers to a musician. (R. 25, 29, 33, 37.) No musician is mentioned in the claims for refund. For 1940 and January 1, through September 30, 1941, the complaint refers to various officers and committee members. (R. 25, 29, 33, 37.) The claims for refund for these periods mention only one physician and no other officer or committee member.

The Government advances no contention that ser-

vices performed by the members of the audit committee are to be included in the term "employment" as defined in Sections 811 (b) of the Social Security Act and 1426 of the Internal Revenue Code. However, the record in this case contains no evidence that a tax was paid with respect to remuneration paid to these individuals. Consequently, no adjustment of the taxpayer's liability is warranted on this point.

An action for the recovery of a refund of tax may not be based on any ground not set forth in the claim for refund on which the action is founded. *United States v. Felt & Tarrant Co.*, 283 U. S. 269. Consequently, the status of any officer referred to in the complaint and not referred to in the claims for refund is not properly in issue in this action. The converse is likewise true. The status of any officer referred to in the claims for refund and not referred to in the complaint is not properly in issue in this action.

The discrepancy which exists between the claims for refund and the complaint in this action is indicated by the chart set forth in Appendix B, *infra*. Taking into account the concession with respect to the members of the audit committee and applying the foregoing principles to the indicated discrepancy, the following officers are found to be properly in issue in this case for the periods named:

Physician	1938 through Sept. 30, 1941
President	1938 through 1939
Vice President	1938
Treasurer	1938 through 1939
Trustees	1938 through 1939

Ballard Aerie Case

This action involves liability for tax on employers of eight or more employees under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code. The individuals whose status is in issue in this case, the years involved in such issue, and the individuals whose service is conceded to be within the term "employment" as defined in Section 907 (c) of Title IX of the Social Security Act and Section 1607 (c) of the Internal Revenue Code (Appendix, *infra*) have been stipulated. (R. 104-106.) This stipulation may be summarized as follows:

In issue	1936	1937	1938	1939
Physician	2	3	2	2
Treasurer	1		1	1
Musician	1	1	1	1
Total	4	4	4	4
Not in issue	5	5	5	5
Total	9	9	9	9

Unless it is determined that in a particular year at least three of the above named individuals in issue

are in the employment of the taxpayer, so as to bring its total employees to eight or more, no liability for tax exists under Title IX of the Social Security Act or Chapter 9C of the Internal Revenue Code with respect to that year.

II

THE TAXPAYERS ARE NOT EXEMPT FROM SOCIAL SECURITY TAX BY VIRTUE OF THEIR BEING FRATERNAL ORGANIZATIONS

While it is stated by the District Court that its decision is based solely on considerations pertinent to the status of the various individuals involved, through repeated reference to the fraternal and non-profit character of the taxpayers it is apparent that the court found some justification for its decision in these latter considerations.

Section 101 (3) of the Revenue Acts of 1936, 1938, and the Internal Revenue Code exempts from income tax fraternal organizations. Section 101 (6) of the Revenue Acts of 1936, 1938, and the Internal Revenue Code exempts from income tax charitable organizations.

Using language identical with that of Section 101 (6), services performed in the employ of a char-

itable organization have always been excluded from the term "employment" by Section 811 (b) (8) of Title VIII of the Social Security Act, now Section 1426 (b) (8) of the Internal Revenue Code, and Section 907 (c) (7) of Title IX of the Social Security Act, now Section 1607 (c) (8) of the Internal Revenue Code. Prior to January 1, 1940, this was the only exemption from social security tax extended to organizations referred to in Section 101. Effective on January 1, 1940, Sections 606 and 614 of the Social Security Act Amendments of 1939 added further provisions to the law, namely Section 1426 (b) (10) (A) (Appendix, *infra*) and Section 1607 (c) (10) (A) of the Internal Revenue Code (excluding from the term "employment" services performed for any organization exempt from income tax by Section 101 of the Internal Revenue Code, under certain conditions. Since fraternal organizations are exempt from income tax under Section 101 (3) of the Internal Revenue Code, such organizations are affected by these latter amendments if the prescribed conditions for exemption are met. However, as stated, these amendments are only effective on and after January 1, 1940.

The District Court cites and quotes from *Hassett v. Associated Hospital Service Corp.*, 125 F. (2d) 611 (C.C.A. 1st), to the effect that merely because a non-

profit organization is, for the first time, specifically made exempt from social security tax under the Social Security Act Amendments of 1939, this does not warrant the inference that prior to such amendments the organization was taxable. This is the theory announced by the dissenting judge in that case and the quotation used by the District Court is from the dissenting opinion in that case. It is held by the majority in the *Hassett* case that the exemption extended to charitable organizations under the Social Security Act prior to January 1, 1940, is not broad enough to include a non-profit hospital service corporation, despite the fact that such latter corporation is exempt under the amendments to this law effective on January 1, 1940. A similar result was reached in *Chester C. Fosgate Co. v. United States*, 125 F. (2d) 775 (C.C.A. 5th), certiorari denied, 317 U.S. 639, holding that the Social Security Act Amendments of 1939 have only prospective effect from January 1, 1940.

The only individual involved in these cases for any period subsequent to January 1, 1940, is the physician in the Aberdeen Aerie case whose status for 1938 through September 30, 1941, is in issue. Of the conditions prescribed for the exemption of non-profit organizations under the Social Security Act subsequent to January 1, 1940, the only provision of possible ap-

plication here is Section 1426 (b) (10) (A) (i) of the Internal Reveue Code to the effect that service of any individual for a non-profit organization is to be excluded from the term employment if the remuneration paid does not exceed $45 in any calendar quarter. The record in this case contains no assertion or evidence that the remuneration paid to the physician was $45 or less in any calendar quarter. Taxpayer bears the burden of proving that it comes within one of these exemption provisions. *Wells Fargo Bank & Union Trust Co. v. McLaughlin,* 78 F. (2d) 934 (C.C.A. 9th), certiorari denied, 296 U.S. 638. That burden has not been met in this case. Consequently, it follows that the exemption provisions made applicable to non-profit organizations after January 1, 1940, by the Social Security Act Amendments of 1939 have no application here.

III

SERVICES WHICH ARE EXCLUSIVELY RITUALISTIC ARE EXCLUDED FROM THE TERM "EMPLOYMENT"

The tax on income of individuals imposed by Section 801 of Title VIII of the Social Security Act and Section 1400 of the Internal Revenue Code (Appendix, *infra*) is measured by a percentage of the "wages"

received with respect to "employment". The excise tax on employers imposed by Section 804 of Title VIII of the Social Security Act and Section 1410 of the Internal Revenue Code and the excise tax on employers imposed by Section 901 of Title IX of the Social Security Act and Section 1600 of the Internal Revenue Code (Appendix, *infra*) are levied with respect to having individuals in their employ and measured by a percentage of the "wages" paid with respect to "employment". The definition of wages contained in Section 811 (a) of Title VIII and Section 907 (b) of Title IX of the Social Security Act and Sections 1426 (a) and 1607 (b) of the Internal Revenue Code is the same, namely, all remuneration for "employment."

From the foregoing it is apparent that the common key word in the application of these taxing statutes is the term "employment". With stated exceptions, this is defined in Section 811 (b) of Title VIII and Section 907 (c) of Title IX of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code as any "service" of whatever nature performed by an "employee" for his employer. From this it follows that the basis of liability for tax under the Social Security Act, with certain additional requirements, is "service" by an "employee".

The distinction between exclusively ritualistic

service and service of an ordinary type was recognized by Congress in the amendment of Sections 1426 (b) and 1607) (c) of the Internal Revenue Code by the Social Security Act Amendments of 1939, excluding from the term "employment" ritualistic service in connection with any "fraternal beneficiary, society, order, or association". By Sections 606 and 614 of the Social Security Act Amendments of 1939, these amendments are effective on January 1, 1940. They do not have retroactive effect. *Chester C. Fosgate Co. v. United States, supra.*. Except for the physician whose services are clearly not ritualistic, no officer is involved in these cases for any period after January 1, 1940. Consequently these statutory amendments with respect to ritualistic service have no application here.

Prior to January 1, 1940, the distinction between ritualistic service and service of an ordinary type was recognized by the Commissioner of Internal Revenue in Mim. 4880, 1939-1 Cum. Bull. 312. It was held that (p. 313):

> * * * ritualistic services, as such, do not constitute "service" within the meaning of that term as used in Sections 811 (b) and 907 (c) of the Act and accordingly that those officers whose duties and activities are exclusively ritualistic, are not, in the performance of such duties and activities, to be considered as being in an "employment" for

> purposes of Titles VIII and IX of the Act. In determining whether or not these services are exclusively ritualistic within the meaning and intent of the foregoing rule, incidental, *non-compensated* administrative services may be ignored.

While the ruling does not define strictly ritualistic activities, by reference solely to officers, it recognizes as ritualistic activities only those performed by officers. Attention is called to the fact that the incidental administrative services which may be ignored must be incidental to strictly ritualistic activities as distinguished from those incidental to the fraternal office generally of the individual concerned. The term "incidental" may be defined as — in connection with and subordinated to.[2]

To summarize, under Mim. 4880 exclusively ritualistic services do not constitute service within the meaning of the term "employment" for purposes of Titles VIII and IX of the Social Security Act. In determining whether services are ritualistic it is necessary that they be performed by a fraternal officer. In determining whether services are exclusively ritualistic, administrative services may be ignored, but

[2] *Builders' Club of Chicago v. United States*, 58 F. (2d) 503 (C.Cls.) *The Robbin Goodfellow*, 20 F. (2d) 924, 925 (W.D. Wash.); "Incident", Bouvier's Law Dictionary (3d Rev.), Vol. 2, p. 1527.

only if (1) they are connected with ritualistic services; (2) they are subordinate to ritualistic services; and (3) they are uncompensated.

The exemption extended by Mim. 4880 results from an administrative construction placed upon this law by the Commissioner of Internal Revenue who is charged with the administration of the taxing sections of the Social Security Act. There is no express statutory provision applicable to these cases which would justify the exemption here sought. No grounds exist for giving this ruling a more liberal application than was intended by the Commissioner. If the individuals here involved do not come within the literal meaning of Mim. 4880 their services are not to be excluded from the term "employment" for purposes of the Social Security Act.

IV

SERVICES PERFORMED BY THE PRESIDENT, VICE PRESIDENT, TREASURER, TRUSTEES, AND MUSICIAN ARE NOT EXCLUSIVELY RITUALISTIC SO AS TO BE EXCLUDED FROM THE TERM "EMPLOYMENT"

There is little in the record of these cases to indicate the nature and extent of the strictly ritualistic duties and activities of the taxpayers' president, vice

president, treasurer, and trustees. This is unquestionably due to the inherently secret character of these ritualistic matters. Despite this deficiency in the record, it is assumed that these officers had duties and performed activities which are strictly ritualistic. However, in addition, these officers performed administrative services. It becomes necessary to determine whether these administrative services can be ignored as being (1) connected with ritualistic services; (2) subordinate to ritualistic services; and (3) uncompensated.

For this purpose, reference is made to the "Constitution for Subordinate Aeries, Fraternal Order of Eagles, as amended and adopted by the Forty-third Grand Aerie Convention, held in Milwaukee, Wisconsin, August 14-18, 1941." This appears in pamphlet form as the taxpayers' Exhibit 6 in the original record in these cases which has been certified to this Court. It is assumed that the provisions of this constitution were the same throughout the period here involved.

The constitution requires the president to notify the grand secretary of the name and address of any Aerie secretary elected other than at an annual election (Art. 9, Sec. 4, p. 16); to notify the chief auditor if the secretary fails to deliver any Aerie funds to the

treasurer (Art 9, Sec. 5, p. 17); to notify the grand secretary and the chief auditor if the treasurer fails to comply with the laws of the lodge (Art. 9, Sec. 6, p. 17); to inspect all ballots and report to the lodge (Art. 9, Sec. 7, p. 17); to sign all warrant checks (Art. 9, Sec. 8, p. 17); to sign all cards, certificates, and other documents requiring his signature for authentication (Art. 9, Sec. 9, p. 17); to consider and, if satisfactory, to sign the semi-annual reports to the grand secretary (Art. 9, Sec. 10, p. 17); to cause the trustees to remit at least semi-monthly to the secretary the money received by the lodge (Art. 19, Sec. 13, p. 17); to appoint all committees and to act as ex officio member of each (Art. 9, Sec. 14, p. 18); to assist the auditing committee and to report to the grand secretary in the event their duties are not performed (Art. 9, Sec. 15, p. 18; Art. 20, Sec. 7, pp. 38-39); and to provide temporary financial aid to any member suddenly stricken with sickness or injury and to report such matter to the lodge (Art. 9, Sec. 16, p. 18). The constitution provides that the president shall receive compensation of $1 per quarter. (Art. 9, Sec. 19, p. 18.)

It is the duty of the vice president to assist the president and to perform all of his duties in the event of the president's incapacitation. He is required to

inspect all ballots. The constitution provides that the vice president shall receive compensation of $1 per quarter. (Art. 10, p. 19.)

The constitution requires the treasurer to demand and receive from the secretary all funds of the Aerie, to give a receipt therefor, and to deposit them in the bank within 48 hours (Art. 13, Sec. 1, p. 23, Sec. 8, p. 25); to sign all warrant checks (Art. 13, Sec. 2, p. 23); to report at each meeting the financial position of the lodge (Art. 13, Section 3, p. 24); to have his books of account in readiness for auditing at the close of each month and to attend the meetings of the auditing committee when requested (Art. 13, Sec. 4, p. 24); to file a written report with the lodge at the end of each quarter, setting forth its receipts and disbursements (Art. 13, Sec. 5, p. 24); to hold in trust for the Aerie all shares of stock, bonds, promissory notes, mortgages, and other securities belonging to the lodge (Art 13, Sec. 6, p. 24); at the end of each semi-annual period to file a detailed report with the lodge and the grand secretary, setting forth the financial position of the Aerie (Art. 13 Sec. 7, p. 24); before the tenth of each month to report to the grand secretary all Aerie funds received and paid out (Art. 13, Sec. 9, p. 25); and to visit weekly each sick member of the lodge (Art. 13, Sec. 10, p. 25). The treasurer

of the Aberdeen Aerie received compensation of $5 per month. (R. 148.) The treasurer of the Ballard Aerie received compensation of $1 per month. (R. 213.)

The Aerie trustees are fraternal officers (Art. 1, Sec. 1, p. 3) elected for terms of 3 years (Art 2, Sec. 7, p. 5). They are required to hold in trust for the benefit of the lodge all its real property and all personal property not entrusted to the treasurer (Art. 14, Sec. 1, p. 26, Art. 14, Sec. 10, p. 28). Meetings of the Board of Trustees must be held at least weekly (Art. 14, Sec. 1, p. 26). They are required to keep all official records (Art. 14, Sec. 1, p. 26) including books setting forth their financial transactions on behalf of the Aerie (Art. 14, Sec. 7, p. 27). Weekly, quarterly, and semi-annual reports to the lodge must be made of their activities (Art. 14, Secs. 5, 7, 8, p. 27). These activities include maintenance and operation of the Aerie home, employment, discharge and control of all employees, and approval of all bills before submission to the lodge for final action (Art. 14, Sec. 2, p. 26). The trustees are required to invest all excess funds of the Aerie in such securities as are approved by the lodge members (Art. 14, Sec. 6, p. 27). They also have the duty of enforcing all rules relative to the conduct of members in the club rooms (Art. 14, Sec.

3, p. 27). The trustees may be removed at any time for cause (Art. 14, Secs. 11-13, pp. 28-29). They received compensation in this case at the rate of $1 per quarter. (R. 146.)

It is the Government's position that the foregoing administrative services of taxpayers' president, vice president, treasurer, and trustees are in no way connected with any strictly ritualistic duties which they may, in addition, perform. Since there is no showing of the extent of the strictly ritualistic activities of these officers, it is impossible to determine that the administrative services are subordinate to the strictly ritualistic activities. In the case of each of these officers, compensation is paid. There is no showing that this compensation is not paid for the administrative services of these officers. It is submitted that the services performed by taxpayers' president, vice president, treasurer, and trustees are not exclusively ritualistic services as defined in Mim. 4880, *supra*, and, consequently, that these officers must be treated as employees for purposes of the Social Security Act.[3]

[3] In *American Legion v. Reynolds* (Minn.) decided August 12, 1943 (P. H. Unemployment Insurance Service, Vol. 1, par. 36, 275), it was held that the vice commander, chaplain, historian, treasurer and judge advocate, unpaid officers of the taxpayer, were in its employment under Title IX of the Social Security Act

The musician involved in the Ballard Aerie case is a member of the lodge who plays the piano at initiations and at the opening and closing of each weekly meeting. For this he received from $2 to $2.50 per meeting. (R. 201-202.)

The complaint in the Ballard Aerie case contains the assertion that this musician was an independent contractor and hence not to be treated as an employee for purposes of this tax (R. 5, 9, 13, 17.) Nevertheless, the record is devoid of any evidence that this musician was not subject to the same degree of control as an ordinary employee. The fact that he played a few selections on the piano at the opening and closing of each weekly meeting, and at initiations does not warrant the conclusion that he was an independent contractor.

The District Court held that services performed by this musician constituted casual labor and for this reason were excluded from the term employment "under the provisions of Title VIII, Sec. 811 (b) (3) Social Security Act, 1935". (R. 82.) The status of the musician is involved only for 1936 through 1939

on the sole ground that they were officers and as such employees *per se* by virtue of Section 1101 (a) (6) of Title IX of the Social Security Act. The case of *Nicholas v. Richlow Mfg. Co.*, 126 F. (2d) 16 (C.C.A. 10th), was cited as authority for this conclusion.

and only in the Ballard Aerie case. This case concerns only Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code. Prior to 1940, this law contained no provision excluding casual labor from the definition of employment. Such a provision, Section 1607 (c) (3) of the Internal Revenue Code, was first added to the law by Section 614 of the Social Security Act Amendments of 1939, effective January 1, 1940. This amendment does not have retroactive effect. *Chester C. Fosgate Co. v. United States*, *supra*.. Hence, it is clear that the ground chosen by the District Court for exempting services performed by this musician was erroneous.

No musician is referred to in the constitution of this fraternal order. It is apparent that he is not an officer of the lodge. For this reason the musician does not come within the scope of Mim. 4880, 1939-1 Cum. Bull. 312, and the services which he performs are not strictly ritualistic services. Consequently, the musician must be treated as being in the employment of taxpayer for purposes of Title IX of the Social Security Act and Chapter 9-C of the Internal Revenue Code.

V

THE AERIE PHYSICIANS ARE WITHIN THE TERM "EMPLOYMENT" SINCE THEY PERFORM SERVICES AS EMPLOYEES FOR TAXPAYERS

During the entire period involved, services were performed for the Aberdeen Aerie and its members by one physician. (R. 88-90.) During 1936, 1938, and 1939, services were performed for the Ballard Aerie and its members by two physicians, and during 1937 by three physicians. (R. 104-106.) To determine the facts relative to this service, reference is again made to the "Constitution for Subordinate Aeries, Fraternal Order of Eagles," *supra.*

The physician holds an office of the lodge (Art. 1, Sec. 1, p. 3), and is elected annually as are the other officers (Art. 2, Sec. 2, p. 4). In the event an Aerie has more than 600 members, an additional physician may be elected for each multiple of 600 or major fraction thereof (Art. 1, Sec. 2, p. 3.) Where it is for the best interests of the Aerie to dispense with the election of a physician as an officer, on approval of the chief auditor, the lodge may do so and enter into a contract for his services. (Art. 15, Sec. 18, pp. 34-35.) However, the physicians here involved were elected officers of the lodge. (R. 120, 202.)

Compensation at the rate of 50 cents per quarter for each member in good standing is paid at the end of each quarter to the physician. (Art. 15, Sec. 13, p. 32.) In the event of more than one physician, this compensation is divided equally, or, with the approval of the chief auditor, divided on a basis of the respective services performed. (Art. 15, Sec. 14, pp. 32-33.) Where it is for the best interest of the lodge and with the dispensation of the chief auditor, the compensation paid to a physician may be at a different rate from that called for in the constitution. (Art. 15, Sec. 15, p. 33.)

With no charge, other than his quarterly compensation from the Aerie the physician is required "to attend, prescribe for and perform such minor surgical work as may be necessary" for all members in good standing and their families. (Art. 15, Sec. 1, p. 29, Sec. 3, p. 30.) Provision is made for similar service for widows of deceased members and their families by the payment of a medical fee to the lodge. (Art. 15, Sec. 6, p. 30.) It is specifically provided that, except in the case of widows, medical service shall be extended only to members in good standing and their families. (Art. 15, Sec. 4, p. 30.) The "minor surgical work" which the physician is required to perform is defined with considerable particularity. (Art. 15, Sec.

17 (d), p. 34.) Treatment required of the physician does not include cases of confinement, social diseases, sickness or injury caused by the use of intoxicating liquors or opiates, or immoral conduct, and does not include any chronic disease or disability which existed when the individual became a member of the Lodge. (Art. 15, Sec. 5, p. 30.) Before treating any members or his family, the physician is required to demand for inspection the member's official receipt showing that he is a member in good standing. (Art 15, Sec. 4, p. 301.) The physician must attend all weekly meetings of the lodge and report the condition of each sick member under his care. At such weekly meetings he must also file with the secretary a report of each sick member under his care on forms prescribed by the board of grand trustees. (Art. 15, Sec. 7, p. 31.) The physician is required to maintain regular office hours, regular telephone service, and to advise the secretary accordingly. In the event he is absent from his office during such hours he is required to have a competent person present to handle all communications. (Art. 15, Sec. 8, p. 31.) In the event a member has been treated by a doctor, other than the Aerie physician, before sick benefits can be paid to that member the certificate of the attending doctor must be approved by the Aerie physician. (Art. 13,

Sec. 11, p. 32.) The committee on grievances, appointed by the president, has the duty to "supervise all acts and duties of every Aerie physician elected by the Aerie". (Art. 24, Sec. 2, p. 42.)

If the Aerie physician fails to attend any ailing member as required by the constitution, the president is empowered to obtain the services of another doctor for this purpose and to deduct the fees of such other doctor from the compensation due the Aerie physician. If the neglect is found to be wilful, the Aerie physician is removed from office. (Art. 15, Sec. 10, pp. 31-32.) Provision is made for removing the physician from office for cause by complaint filed with and hearing before the grievance committee. (Art. 24, p. 22.) In addition, the services of the physician may be dispensed with entirely if the general fund of the lodge does not warrant (Art. 1, Sec. 2, p. 3), or, if the maximum sick benefits provided by the constitution are not paid, or if funeral benefits of less than $100 are paid (Art. 16, Sec. 3, p. 35), or whenever it is for the best interests of the lodge (Art. 15, Sec. 18, pp. 34-35).

It appears from the testimony in these cases that in practice the physicians here involved do not adhere strictly to certain of the foregoing requirements of the fraternal constitution, for instance, attendance at all

weekly meetings. (R. 127, 129-130.) However, the taxpayers have the power to require strict compliance by the physicians with the duties of their fraternal office.

The expenses of procuring and maintaining the physical office and equipment of the physician are paid by him, in part out of the quarterly compensation which he receives from taxpayers. No direct payment is made by taxpayers for these specific purposes. (R. 121-123.) The services rendered for the lodge members by the physician are performed either in his office, their homes, or in a hospital. (R. 124.)

It was held by the District Court that the physicians here involved were not in the employment of taxpayers on two grounds: (1) They were ritualistic officers of the taxpayers, and (2) the services which they performed for taxpayers were rendered by them as independent contractors. (R. 82.)

From the previous discussion of what constitutes exclusively ritualistic services under Mim. 4880, 1939-1 Cum. Bull. 312, it is considered apparent that the services rendered by these physicians were not exclusively ritualistic services. There is no showing that they had any activities which were strictly ritualistic. Certainly the administrative duties which they performed had no relation to any ritualistic matters.

In addition, the physicians received substantial compensation for the services which they rendered on behalf of the taxpayers.

Section 1101(a) (6) of Title XI of the Social Security Act, applicable to both Titles VIII and IX of that Act (Appendix, *infra*), and Sections 1426(d) and 1607(i) of the Internal Revenue Code provide: "The term 'employee' includes an officer of a corporation." Article 3 of Treasury Regulations 91, promulgated under Title VIII of the Social Security Act; Section 402.204 of Treasury Regulations 106, promulgated under Chapter 9A of the Internal Revenue Code; Article 205 of Treasury Regulations 90, promulgated under Title IX of the Social Security Act, and Section 403.204 of Treasury Regulations 107, promulgated under Chapter 9C of the Internal Revenue Code, provide: "An officer of a corporation is an employee of the corporation, * * *."

The taxpayer involved in *Nicholas v. Richlow Mfg. Co.*, 126 F. (2d) 16 (C.C.A. 10th), concededly had seven employees within the meaning of Title IX of the Social Security Act. The question presented was whether the taxpayer's corporate secretary was likewise an employee so as to render taxpayer liable for taxes under that Act. During the years involved the

secretary (p. 17) — "performed the duties of that office in accordance with § 15 of the taxpayer's by-laws." The extent of the services actually performed by the secretary is not shown. She received no compensation for these services. The court held that this individual was an employee of taxpayer since she held the office of corporate secretary and, under Section 1101 (a) (6) of Title XI of the Social Security Act, corporate officers are employees *per se*.[4]

In discussing the purpose of Section 1101 (a) (6), the court in the *Richlow* case, *supra*, noted that under certain state laws, such as workmen's compensation laws, much litigation had arisen as to whether a corporate officer was capable of being an employee under the usually accepted tests of employer-employee relationship; that it was to obviate this troublesome question that Section 1101 (a) (6) was enacted; that to accomplish this purpose Section 1101 (a) (6) must be construed as rendering all corporate officers employees without regard for the details of their relationship with the corporation.

[4] To the same affect see: *American Legion v. Reynolds* (Minn.), decided August 12, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,275); *Builders Lumber & Supply Co. v. United States*, 48 F. Supp. 241 (W.D. Wis.); *Beaverdale Memorial Park v. United States*, 47 F. Supp. 663 (Conn.).

If the construction of the statute announced in the *Richlow* case be accepted, it is plain that the individuals here involved must be regarded as employees. They hold a corporate[5] office which is provided for by the fraternal constitution and the taxpayers' by-laws. They were elected to this office by vote of taxpayers' members as were the other officers of the taxpayers.

Two days after the decision in the *Richlow* case, the Circuit Court of Appeals for the First Circuit rendered its decision in *Deecy Products Co. v. Welch*, 124 F. (2d) 592. The taxpayer in that case had seven individuals who were concededly employees for purposes of Title IX of the Social Security Act. The question presented was whether the statutory clerk of the taxpayer corporation was likewise an employee so as to render it liable for taxes under that Act. During the year involved the clerk in question actually

[5] Section 1101 (a) (4) of Title XI of the Social Security Act, applicable to both Title VIII and IX of that Act, and Section 3797 (a) (3) of the Internal Revenue Code, applicable to Chapter 9A and C of the Internal Revenue Code, provide that the term "corporation" includes associations. No question has been raised in these cases of any distinction between the corporate structure of these fraternal associations and any other corporation organized under the laws of the State of Washington.

performed services which required only 35 minutes of his time. However, taxpayer's by-laws set forth in some detail the duties of its corporate clerk with the provision that he (p. 593) "shall perform such other duties as the directors shall from time to time prescribe." The clerk received no compensation for his services.

While the *Richlow* case was not mentioned, the court in the *Deecy Products* case, *supra*, implicitly differed with the Circuit Court of Appeals for the Tenth Circuit in the purport of Section 1101(a) (6) of Title XI of the Social Security Act. It was the court's opinion that while the enactment of this section was to put at rest a troublesome question which had arisen under certain state laws, the question so obviated was not whether a corporate officer was capable of being an employee, but rather whether a corporate officer who was also an employee under the accepted tests of employer-employee relationship came within the general scope of the particular law. Accepting this as the purpose of Section 1101 (a) (6), the court held that a corporate officer was an employee only if the pertinent facts satisfied the accepted tests of such status; that, having been determined to be an employee, such

corporate officer was within the general scope of the Social Security Act.[6]

Despite the fact that the corporate clerk in the *Deecy Products* case received no compensation and performed services extending over only 35 minutes, the court emphasized the potential control which the corporate directors had over the clerk and their power under the by-laws to direct him to perform such unenumerated services as they might prescribe. It was concluded that these factors were sufficient to render the corporate clerk an employee of taxpayer. Regardless of what appears to be a conflict between the two courts concerning the effect of Section 1101(a) (6), it will be noted that the test of employer-employee relationship applied by the court in the *Deecy Products* case would likewise render the corporate secretary involved in the *Richlow* case an employee.

Simultaneously with the *Deecy Products* case the

[6] To the same effect see: *First State Bk. & Tr. Co. v. United States* (S.D. Tex.), decided July 2, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,267; *Jackson County State Bank v. United States* (S.D. Tex.), decided April 16, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,265; *Dorfman's Jewelry Store v. United States* (S.D. Tex.), decided February 13, 1943, not reported; *San Antonio Trunk Co. v. United States* (W.D. Tex.), decided July 1, 1941 (P-H Unemployment Insurance Service, Vol. 1, par. 36,163).

Circuit Court of Appeals for the First Circuit handed down its decision in *United States v. Griswold*, 124 F. (2d) 599. The taxpayer involved in that case was a Massachusetts business trust, treated for purposes of the opinion as a corporation. The taxpayer concededly had more than eight employees under Title IX of the Social Security Act so as to be subject to the tax imposed by that Act. However, the question was whether its five trustees were employees so as to result in their salaries being includable in the tax base. These trustees performed extensive services for the taxpayer and received substantial compensation. The trust instrument provided (p. 600) that the trustees "in all instances shall act as principals, and are and shall be free from the control of the shareholders." The choice of trust investments was in the uncontrolled discretion of the trustees. Within certain limits, they had the power to fix their own compensation. They held their office for life except that any one trustee could be removed on order of all the remaining trustees. These trustees were accountable to nobody comparable to a corporate board of directors. Applying the same reasoning that it applied in the *Deecy Products* case, *supra*, the court held that these trustees were not employees for purposes of Title IX of the Social Security Act. This conclusion was based on the fact that the trustees were

almost untrammeled in their activities, being subject to no control by a board of directors and practically no direct control by the shareholders. The control of a superior authority which was found to be lacking in the *Griswold* case is clearly present in the cases at bar. Accordingly, the *Griswold* case is not an authority opposed to the Government's position here.

The most recent case on this subject is *Independent Petroleum Corp.* v. *Fly*, 141 F. 2d 189 (C.C.A. 5th) That case involved the question of whether taxpayer's corporate secretary was an employee under Title IX of the Social Security Act so as to make it an employer of eight or more individuals and thereby subject to the tax imposed by that Act. During the year involved the only actual service performed by this corporate secretary was affixing her signature to two tax returns and the minutes of an annual stockholders' meeting, none of which documents did she prepare herself. The court placed the same construction on Section 1101 (a) (6) of Title XI of the Social Security Act as did the Circuit Court of Appeals for the First Circuit in the *Deecy Products* and *Griswold* cases, *supra*, to the effect that a corporate officer was an employee only if the pertinent facts satisfied the accepted tests of employer-employee relationship. However, to determine the existence of this relationship, the court in

effect differed with the Circuit Court of Appeals for the First Circuit in the test to be applied. It held (p. 191) that only an officer who works "in fact", who "actually works", and who is "really employed" constitutes an employee. Applying this test to the facts in the *Independent Petroleum* case, *supra*, the court concluded that the corporate secretary involved was not an employee for purposes of Title IX of the Social Security Act.

If the construction placed upon Section 1101 (a) (6) in the *Richlow* case be accepted, then the physicians here involved, being duly elected officers of the taxpayers, are their employees *per se*. However, if this construction of the statute is not accepted and the Aerie physicians are not employees *per se*, they are, nevertheless employees under the tests of employer-employee relationship applied in the *Deecy Products* and *Griswold* cases, *supra*, and in the *Independent Petroleum* case, *supra*.

The details of control by taxpayers over the Aerie physicians are set forth in the fraternal constitution. The physicians are required to perform a generally defined type of service for taxpayers. Before this service may be rendered they must ascertain whether the patient is a member in good standing of the lodge. The physicians must attend all weekly meetings of the

lodge and at each meeting make both oral and written reports of the condition of ailing members treated by them. They must maintain regular office hours and telephone service and make provision for secretarial assistance to be responsible for all communications. Where a member has been treated by a doctor other than an Aerie physician, before that member may obtain sick benefits the Aerie physician must approve the certificate of the attending doctor. General control over the physicians is delegated to the committee on grievances whose duty it is to "supervise all acts and duties of every Aerie physician elected by the Aerie."

These and other items of supervision by taxpayers over the physicians result in a degree of control comparable to, if not exceeding, that considered in the *Deecy Products* case, *supra*, sufficient to create an employer-employee relationship. Certainly the degree of control here exceeds that exercised by the shareholders over the trustees in the *Griswold* case, *supra*.[7]

[7] It is to be noted that the question of control by taxpayers over the Aerie physicians in these cases becomes academic if the reasoning of the *Richlow* case is accepted.

If the reasoning of the *Deecy Products* and *Griswold* cases is accepted, the existence of the requisite control to result in an employer-employee relationship must be determined on the facts of the particular case.

In S.S.T. 291, 1938-1 Cum. Bull. 416, it was held

In the *Independent Petroleum* case, *supra*, emphasis was placed on the requirement that the corporate officer "actually works" in order to make him an employee. There can be no question concerning the actuality of the services performed for taxpayers by the physicians in these cases. That these services were substantial and valuable is indicated by the rate of compensation paid by taxpayers to the physicians.

It is the Government's position that under the tests of an employer-employee relationship applied in the *Deecy Products* and *Griswold* cases, *supra*, and in

that a physician who, pursuant to an oral agreement with a manufacturing company, visited the company's plant for at least two hours each morning and there tended the employees and examined the prospective employees of the company, and received for this service a fixed amount per month, was an employee of the company for purposes of Titles XIII and IX of the Social Security Act.

In C.T. 18, 1939-2 Cum. Bull. 295, it was held that local physicians who treated the sick and injured employees and injured passengers of a railway company pursuant to an oral agreement with the company whereby they were paid a fixed monthly retainer by the company, were not employees of the company under Chapter 9B of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937). To the same effect, see S.S.T. 240, 1937-2 Cum. Bull, 403, involving a physician; C.T. 15, 1939-1 Cum. Bull. 318, involving an attorney; and S.S.T. 86, 1937-1 Cum. Bull. 462, also involving an attorney.

the *Independent Petroleum* case, *supra*, the physicians here involved were employees of taxpayers for purposes of the Social Security Act.

CONCLUSION

For the reasons stated herein it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII — TAXES WITH RESPECT TO EMPLOYMENT

SECTION 801. * * *, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in Section 811) received by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (42 U.S.C. 1940 ed., Sec. 1001.)

SEC. 804. * * *, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 811) paid by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (42 U.S.C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, * * *.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * *

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, for the prevention of cruelty to children or animals, no part of the net earnings of which

inures to the benefit of any private shareholder or individual. (42 U.S.C. 1940 ed., Sec. 1011.)

TITLE IX—TAX ON EMLOYERS OF EIGHT OR MORE

SECTION 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year:

* * *

(42 U.S.C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, * * *.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * *

(7) Service performed in the employ of a corporation, community chest, fund, or foundation,

organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. (42 U.S.C. 1940 ed., Sec. 1107.)

TITLE XI — GENERAL PROVISIONS

SECTION 1101. (a) When used in this Act—

* * *

(6) The term "employee" includes an officer of a corporation.

* * *

(42 U.S.C. 1940 ed., Sec. 1301.)

The foregoing provisions became, without change, Section 1400, 1410, 1426 (a) (b) and (8) and (d), 1600, and 1607 (a), (b), and (c) (8) of the Internal Revenue Code.

Internal Revenue Code:

SEC. 1400 [as amended by the Social Security Act Amendments of 1939, c. 666, 53 stat. 1360, Sec. 601]. RATE OF TAX.

* * *, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in Section 1426 (a)) received by him after December 31, 1936, with respect to employment as defined in Section 1426 (b)) after such date:
* * *

(26 U.S.C. 1940 ed., Sec. 1400.)

SEC. 1410 [as amended by the Social Security Act Amendments of 1939, Sec. 604]. RATE OF TAX.

* * *, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in Section 1426 (b)) after such date: * * *

(26 U.S.C. 1940 ed., Sec. 1410.)

SEC. 1426 [as amended by the Social Security Act Amendments of 1939, Sec. 606]. DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term 'wages' means all remuneration for employment, * * *

* * *

(b) *Employment.* — The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *, except—

* * *

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the acti-

vities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * *

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, * * *.

(26 U.S.C. 1940 ed., Sec. 1426.)

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in Section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

* * *

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be

accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

An officer of a corporation is an employee of the corporation, * * *.

Treasury Regulations 91, promulgated under Title VIII of the Social Security Act:

ART. 3. *Who are employees.*—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an em-

ployment as defined in Section 811 (b). (see article 2)

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in

which they offer their services to the public, are independent contractors and not employees.

* * *

An officer of a corporation is an employee of the corporation, * * *.

The foregoing provisions are the same as those contained in Section 402. 204 of Treasury Regulations 106, under the Federal Insurance Contributions Act (Sections 1600 *et seq.* of the Internal Revenue Code.)

APPENDIX B

Aberdeen Aerie v. United States of America

OFFICER	CLAIM FOR REFUND	COMPLAINT	PROPERLY IN ISSUE
	1938		
Physician	x(1)	x(2)	x(1)
President	x*	x	x
Vice President	x*	x	x
Treasurer	x*	x	x
Conductor	x		
Musician		x	
Trustees	x	x	x
	1939		
Physician	x(1)	x(2)	x(1)
President	x*	x	x
Vice President		x	
Treasurer	x*	x	x
Conductor	x		
Musician		x	
Trustees	x	x	x
	1940		
Physician	x(1)	x(2)	x(1)
President		x	
Vice President		x	
Treasurer		x	
Conductor			
Musician		x	
Trustees		x	
	JAN. 1, 1941 THROUGH SEPT. 30, 1941		
Physician	x(1)	x(2)	x(1)
President		x	
Vice President		x	
Treasurer		x	
Conductor			
Musician		x	
Trustees		x	

*Conceded to be included in claim for refund though there referred to by proper name of office-holder only.

No. 10686

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

v.

ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, a corporation, *Appellee*.

———and———

UNITED STATES OF AMERICA, *Appellant*,

v.

BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES, a corporation, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION
HON. CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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INDEX

	Page
Opinion below (50 F.Supp. 734-738)	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Regulations Involved	2
Statement of the Case	2
Summary of Argument	3
Argument	3
1. The Aerie physicians are not in employment within the meaning of Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code, and of Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code	3
2. Ritualistic Officers of a Fraternal Organization were not intended to be included as employees within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935..	18
3. Services performed by the Worthy President, Worthy Vice-President, Worthy Treasurer, Worthy Trustees and the Musician are principally ritualistic and do not constitute Employment for the purposes of Titles VIII and IX of the Social Security Act	22
Conclusion	25

TABLE OF CASES

Burnet v. Jones (C.C.A. 8th, 1931) 50 F.(2d) 14	9
Burnet v. McDonough (C.C.A. 8th) 46 F.(2d) 944	10
Childers v. Commissioner of Internal Revenue (C.C.A. 9th, 1935) 80 F.(2d) 27	10
Commissioner of Internal Revenue v. DeLeuw (C.C.A. 7th) 95 F.(2d) 647	11
Commissioner of Internal Revenue v. Modjeski (C.C.A.2d, 1935) 75 F.(2d) 468	11

Page

Deecy Products Co. v. Welch (C.C.A. 1st) 124 F.(2d) 592 16, 17
Independent Petroleum Corp. v. Fly (C.C.A. 5th) 141 F.(2d) 189 17
Indian Refining Co. v. Dallman, 31 F.Supp. 455, Aff. 119 F.(2d) 417 8
Matcovich v. Anglim, 134 F.(2d) 834 9
Meigs v. United States (C.C.A. 1st, 1940) 115 F.(2d) 13 11, 12
Nicholas v. Richlow Mfg. Co. (C.C.A. 10th) 126 F.(2d) 16 15
Radio City Music Hall Corporation v. United States, 135 F.(2d) 715 7
Sorrells v. United States, 287 U.S. 435 20
Underwood v. Commissioner of Internal Revenue (C.C.A. 4th, 1932) 56 F.(2d) 67 11
United States v. American Trucking Association, 310 U.S. 534 20
United States v. Griswold (C.C.A. 1st, 1941) 124 F.(2d) 599 17

TEXTBOOKS

C.C.H. Unemployment Service, Vol. 6, par. 8111-04, Washington, April 18, 1942 13, 23
S.S.T. 152, 1937-1 Cum. Bull. 372 13
S.S.T. 212, 1937-2 Cum. Bull. 3971 6
S.S.T. 240, 1937-2 Cum. Bull. 403 14

STATUTES

Internal Revenue Code, Chapter 9A 2
Chapter 9C 2
§1426 (b) 3
§1426 (d) 3, 15
§1607 (i) 15
Rem. Rev. Stat. of Washington, §9998-102-119q 23

Page

Social Security Act, 49 Stat. 636,
Title VIII 2, 3,5, 7, 9, 14, 18, 19, 25
Title IX 2, 3, 4, 5, 7, 9, 14, 18, 19, 25
§811 3
§1101 3, 15, 16
§101 21
Title XI 15, 16, 17

Treasury Regulations 90 7, 8
91 7, 8

APPENDIX A follows p. 25, 1A
Social Security Act, c. 531, 49 Stat. 636 1A
Title VIII.—Employment Taxes 1A
§801 1A
§804 1A
§811 1A
Title IX.—Tax on Employers of Eight or More.. 1A
§901 1A
§907 2A
Title XI—General Provisions 2A
§1101 2A
§1426 2A

APPENDIX B 4A
Regulations 4A
Art. 3 4A
Treasury Regulations 91, Concerning Title VIII of the Social Security Act 4A
Treasury Regulations 90, Concerning IX of the Social Security Act 5A
Art. 205 5A

No. 10686

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———and———

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

OPINION BELOW

The opinion of the District Court (R. 73-85) is reported in 50 F.Supp. 734-738.

JURISDICTION

Appellee accepts the statement of jurisdiction contained in the brief for appellant.

QUESTIONS PRESENTED

I.

The sole question for determination in the Aberdeen Aerie case is whether the Worthy Physician, Worthy President, Worthy Vice-President, Worthy Treasurer and Worthy Trustees were in the employment of Aberdeen Aerie No. 24 of the Fraternal Order of Eagles under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code.

II.

The sole question for determination in the Ballard Aerie case is whether the Worthy Physicians, Worthy Treasurer and Worthy Trustees and a Musician were in the employment of Ballard Aerie No. 172 of the Fraternal Order of Eagles under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

STATUTES INVOLVED

The only statutes pertinent to this appeal are set forth in Appendix A, *infra.*

REGULATIONS INVOLVED

The regulations pertinent to this appeal are incorporated in Appendix B, *infra.*

STATEMENT OF THE CASE

In our view, appellant's statement of the case is sufficiently comprehensive and correct. Therefore appellee shall not attempt a re-statement.

SUMMARY OF ARGUMENT

A. The relationship of employer and employee has not been established relative to the Aerie physicians of the respective Aeries, and the evidentiary facts clearly indicate that these physicians were independent contractors.

B. Congress did not intend to include within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935 ritualistic officers of a fraternal organization such as the worthy President, Worthy Vice-President, Worthy Treasurer and Worthy Trustees.

C. The services performed by the Worthy President, Worthy Vice-President, Worthy Treasurer, Worthy Trustees and a Musician are principally ritualistic and do not constitute employment within the meaning of Titles VIII and IX of the Social Security Act.

ARGUMENT

1. The Aerie Physicians are not in Employment Within the Meaning of Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code, and of Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

The appellee contends that the Aerie physician in the *Aberdeen Aerie* case is not an employee under Sections 811 (b) and 1101 (a) of the Social Security Act, and Sections 1426 (b) and (d) of the Internal Revenue Code relative to the tax imposed under Title VIII of the Social Security Act.

A similar contention is urged in the *Ballard Aerie*

case that the Aerie physicians are not employees under Title IX of the Social Security Act and Chapter 9, Subchapter C of the Internal Revenue Code.

The District Court in its opinion (R. 73-85) determined that the Aerie physicians be excluded from the provisions of the Social Security Act for the reasons (1) that they are ritualistic officers; (2) that the character of their services was strictly professional and came within the exemptions enumerated in the Departmental Regulations, and (3) they were independent contractors as the evidence failed to establish an employer and employee relationship.

It is to be particularly noted that the District Court was convincingly impressed with the evidentiary fact that the appellee exercised no control or supervision over the manner and means employed in rendering the services, and that the professional services rendered were completely within the discretion of the Aerie physician (R. 82).

It is axiomatic that the relationship of employer and employee exists only when the person for whom the services are performed has the right to direct and supervise an individual who performed such services, not only as to the result to be accomplished by the work, but also as to the details, means and methods employed to accomplish such result. Unless an individual is subject to the will and control of the employer not only as to what shall be done but how it shall be done, the employer and employee relationship cannot be created.

The appellant urges that appellee's Exhibit No. 6, which has been designated as the Constitution for

Subordinate Aeries of the Fraternal Order of Eagles, contains sufficient elements of control from which to conclude that the Aerie physicians are in employment within the meaning of Titles VIII and IX of the Social Security Act.

This court's attention is particularly directed to the Constitution for Subordinate Aeries (Art. 15, Sections 1 to 18 inclusive, pages 30 to 35 inclusive, Appellee's Exhibit No. 6) for the purpose of determining the correctness of the appellant's contention that there is contained in the Constitution, the elements of control, direction and supervision as to the means and methods utilized by Aerie physicians in accomplishing the desired result.

Appellee on the other hand submits that the provisions of the Constitution for Subordinate Aeries (Appellee's Exhibit No. 6) pertaining to Aerie physicians, relates solely to the result rather than to the method or means to be exercised in accomplishing the result. These provisions do not grant to the appellee the prerogative to supervise or control the details of the services performed by the physicians.

The testimony of Dr. Edward B. Riley (R. 120-127) convincingly establishes the Aerie physicians as independent contractors rather than employees within the meaning of the Act.

The following facts are established by the testimony of Dr. Edward B. Riley, and clearly indicate that the Aerie physicians in all instances do not occupy the relationship of employer and employee: The physician is selected by election (R. 120); he provides for any equipment or medicine which may be

used in treating an individual member (R. 123); the services rendered to the Fraternal Order of Eagles constitutes a small percentage of the physician's general practice and he is not required to give preference to members of the Fraternal Order of Eagles in connection with his general practice (R. 123-124); the Aerie does not direct the physician as to the manner or method utilized in treating the members of the Aerie (R. 124-126).

After scrutinizing the testimony of Dr. Edward B. Riley (R. 120-127) it becomes immediately apparent that the necessary elements of control and supervision, in order to establish the legal concept of an employer and employee relationship, are not vested in the appellee and it must necessarily be concluded that the Aerie physicians in issue are independent contractors.

In S.S.T. 212, 1937-2 Cum. Bull. 3971, the following test is set forth for the purpose of determining whether an individual is an employee or independent contractor:

> "In determining whether an individual is an employee or independent contractor the following, among other things, should be considered: (1) the extent or control which the employer may exercise over the details of the work either under contract or in fact; (2) the skill required in the particular occupation; (3) whether the employer or workman supplies the instrumentalities, tools and the place of work; (4) whether the one employed is engaged in a distinct occupation or business; (5) the length of time for which the person is employed; (6) the method of payment, whether by the time or by the job."

It is significant and pertinent to the immediate issue involved that Treasury Regulation 90, promulgated under Title IX of the Social Security Act and Treasury Regulation 91, promulgated under Title VIII of the Social Security Act, codify the common law rule of master and servant and specifically exclude from the operation of the Social Security Act individuals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers and auctioneers who are customarily engaged in an independently established profession or business. These Treasury Regulations it is submitted are determinative as to the question of whether physicians are employees within the meaning of Titles VIII and IX of the Social Security Act, and have repeatedly been considered by the courts as authoritative whenever this immediate issue has arisen.

In commenting upon Article 3 of Treasury Regulation 91, the court made the following observation in the case of *Radio City Music Hall Corporation v. United States*, 135 F.(2d) 715, 717:

> "We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an 'employee' and an 'independent contractor': it is really no more than a gloss upon the definition contained in Justice Gray's opinion in *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 523, 10 S. Ct. 175, 33 L. Ed. 440, we assumed its conclusiveness in *Texas Co. v. Higgins*, *supra*, 118 F.(2d) 636, 638, and so have the Tenth Circuit (*Jones v. Goodson*, 121 F.(2d) 176, 179) and the Seventh (*Williams v. United States*, 126 F.(2d) 129, 132), the test lies in

> the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said; though the regulation redundantly elaborated it. In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractor. He decides how the different parts of the work must be timed and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees."

A helpful and excellent expression of the pertinency of Treasury Regulations 90 and 91 is contained in the opinion rendered by the court in the case of *Indian Refining Co. v. Dallman*, 31 F.Supp. 455, 456 (affirmed by the Circuit Court in 119 F.(2d) 417):

> "The Social Security Act in both Titles VIII and IX, defines 'employment' as used in the Act, as 'any service, of whatever nature, performed within the United States by an employee for his employer, except' * * *. See Sec. 811 (b), and 907 (c), 42 U.S.C.A. §1011 (b), 1107 (c)."
>
> "Regulations defining the term 'employment,' known as 90 and 91, were duly prescribed and approved by the Commissioner of Internal Revenue pursuant to the provisions of said two titles and other provisions of the Internal Revenue Laws, on February 17, 1936 (relating to Title IX), and on November 9, 1936 (relating to Title VIII). In both of said regulations it was specifically provided that to constitute an 'employment' under the provisions of said two titles,

> 'the legal relationship of employer and employee must exist.' By said regulations certain rules were stated in accordance with which it could be determined whether such legal relationship exists."

This court in the case of *Matcovich v. Anglim*, 134 F.(2d) 834, 837, recognizes the right of control is an essential element of the relationship of employer and employee:

> "While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of the work by the latter and the right to direct the manner in which the work shall be done. * * *"

Appellee invites the court's attention to several analagous cases concerning the status of individuals customarily engaged in an independently established business or profession. It is submitted that these cases are decisive and clearly support appellee's contention that the Aerie physicians in issue are not in employment within the meaning of Title VIII and Title IX of the Social Security Act.

In the case of *Burnet v. Jones* (C.C.A. 8th, 1931), 50 F.(2d) 14, 15, the question presented concerned whether an attorney who was retained under an

agreement to render legal services was an employee, and the court declared:

> "A lawyer who is retained in the affairs of his client is not properly designated an employee. He is an officer of the court. As counselor and advisor to his clients and as an advocate before the court, whatever action he takes is upon independent judgment illuminated by his learning, his skill, his experience, and his ethics. The relationship of attorney and client is entered into and maintained with regard to these considerations, and is not that of employer and employee."

This court in the case of *Childers v. Commissioner of Internal Revenue* (C.C.A. 9th, 1935) 80 F.(2d) 27, 30, ruled that an attorney engaged by an irrigation district on the basis of an annual retainer, with a provision for additional compensation for the trial of cases and services rendered while away from the district, was not an employee:

> "To render one an employee, the employer's right of control must be complete, and extend to the details of the work."

The case which appellee considers controlling is *Burnet v. McDonough* (C.C.A. 8th) 46 F.(2d) 944, 947, wherein the question arose as to whether an attorney engaged by a bridge district upon a retainer basis was an employee. The respondent testified in part as follows:

> "I maintain my own office and the general practice of law. Whatever stenographic or clerical work became incident to the transaction of the Bridge Commission's business was performed by my employees with the exception of probably once or twice in 1921 or 1922."

The court declared that the relationship of employer and employee did not exist:

> "It is clear to us that, under the decisions of the Supreme Court and of this court, respondent was not an employee as that term is used in the statute, but he was an independent contractor. The board reserved no right to direct him as to how his work should be done. He was engaged in the general practice of law. It placed its legal matters in his hands for him to take care of by his own means and methods, relieving it from responsibility therefor. It exercised no such control over him as characterizes the relation of employer and employee. The board would not assume to know how a lawyer should carry on his work. He was engaged to render legal services just as he would have been engaged by a private individual."

The court in the cases of *Commissioner of Internal Revenue v. Modjeski* (C.C.A.2d, 1935) 75 F.(2d) 468, and *Commissioner of Internal Revenue v. De-Leuw* (C.C.A. 7th) 95 F.(2d) 647, decided that a consulting engineer was an independent contractor.

Similarly the court ruled in *Underwood v. Commissioner of Internal Revenue* (C.C.A. 4th, 1932), 56 F.(2d) 67, that a supervising architect occupied a status of an independent contractor.

Appellee particularly relies upon the case of *Meigs v. United States* (C.C.A. 1st, 1940), 115 F.(2d) 13, 17, as excellent authority in support of its argument that the Aerie physicians in issue were not in employment under the terms and provisions of the Social Security Act. The primary question presented in

Meigs v. United States (C.C.A. 1st, 1940) 115 F.(2d) 13, 17, was whether a gynecologist employed by a state hospital was an employee and the court, in concluding that the relationship of employer and employee did not exist, declared:

> "The plaintiff is not subject to sufficient control to be considered an employe. He is in complete charge of the gynecological service of the hospital, and *no one tells him how to treat the patients under his care.* The hospital is interested only in the satisfactory coverage of the service. The plaintiff gives up only a small portion of his time to the hospital and *is under no obligation to give the hospital patients preference over his private patients.* The Pondville State Hospital is only one of four hospitals to the visiting staffs of which the plaintiff is attached. At each of these hospitals he is subject to the regulations and rules governing visiting doctors and could be required to submit reports and consult with other doctors in charge of the institution. *The income from the hospital is but a small portion of his total annual income, and his private practice is extensive.* The plaintiff is considered to be an outstanding doctor in his field, and the reports to, consultation with, and oversight of the superintendent of the hospital is certainly not the type of control necessary to set up the relation of employer and employee." (Italics ours)

The identical issue before this court for determination arose in the cause entitled: "In the matter of a petition for hearing by Ballard Aerie No. 172, Fraternal Order of Eagles, before the Appeal Tribunal of the Unemployment Compensation and Placement

of the State of Washington, Docket No. P-53, reported on April 18, 1942 (C.C.H. Unemployment Insurance Service, Vol. 6, par. 8111.04, Washington,)" wherein it was decided that an Aerie physician rendering services to a Subordinate Aerie of the Fraternal Order of Eagles was not in employment under the provisions of the Washington Unemployment Compensation Act:

> "The first of these conditions is that the services be performed free from direction or control, both under the contract of service and in fact. In considering the status of the physicians, it is important to bear in mind that any reservation of the right to control on the part of petitioner would tend to defeat the purpose of the contracts, for the physicians were engaged to exercise their own professional skill in treating the members. The contracts, by their very nature, seem to preclude the thought of any direction or control by petitioner. It is true, of course, that the physicians are required to keep regular office hours, to give prompt attention to calls, and to do a number of other things pursuant to their contracts. These requirements, however, are merely some of the conditions which go to make up contracts; in no sense may they be said to establish 'direction or control' over the manner of performance. * * *."

In S.S.T. 152, 1937-1 Cum. Bull. 372, it was held that a roentgenologist who interprets x-rays under a contract for a certain company, and who maintains his own office and performs like services for others and is not subjected to any control or direction as to the manner in which his services are performed,

is not an employee of the company within the meaning of Titles VIII and IX of the Social Security Act.

A somewhat analogous situation to the one presented in the instant case appears in S.S.T. 240, 1937-2 Cum. Bull. 403:

> "A physician serves under verbal contract with a coal company whereby he agrees to render medical services to the employees of that company in cases where the company is in any way responsible for the employees' health. The physician must be available at all times. The physician employs two assistants to serve the employees of the company at the physician's direction. The physician conducts his own private practice in which he is assisted by the two aforementioned individuals, but he must give preference to the employees of the company. There is no agreement with the company as to the length of time which the physician is to serve, or as to the discontinuance of his services. He is not required to care for all the employees of the company. The company has nothing whatever to do with the general practice of the physician, and he is paid by the employees of the company for the treatment they receive where such treatment does not fall within the scope of the contract. The physician is paid a regular monthly salary by the company for his services under the contract.
>
> "The regular monthly salary is in effect a fee to retain his services to treat employees of the company in accordance with the verbal contract. The company does not have the right to exercise sufficient control over the manner and means in which the physician performs his duties to establish the relationshp of employer and em-

ployee. The fact that the company furnishes all medicines and dressings and pays the expenses of local hospitalization when necessary is not determinative in this case. It is, accordingly, held that the physician engaged in performing services under the stated circumstances is not an employee of the coal company within the meaning of Titles VIII and IX of the Social Security Act."

Appellant, relying upon Section 1101 (a) (6) of Title XI of the Social Security Act and Sections 1426 (d) and 1607 (i) of the Internal Revenue Code, advances a two-fold contention, namely: (1) that the Aerie physicians by virtue of being officers are employees *per se* and (2) in addition to being officers the Aerie physicians occupy an employer and employee relationship to appellee and that therefore Aerie physicians must be deemed to be included as employees under the provisions of the Social Security Act.

In answer to appellant's contention, appellee adopts the position that a corporate officer is not an employee *per se* but can be an employee if the common law test of employer-employee relationship is met. It is submitted that the better reasoned authority insists upon the establishment of employer-employee relationship as a condition precedent to a corporate officer being considered an employee under the provisions of the Social Security Act.

Appellant cites *Nicholas v. Richlow Mfg. Co.* (C.C.A. 10th) 126 F.(2d) 16, as authority in support of its contention that a corporate officer under Section 1101 (a) (6) Title XI of the Social Security

Act is an employee *per se*. Appellant desires to direct the court's attention to the fact that this cited authority stands alone and has on numerous occasions been rejected.

It is particularly significant that the Government in the case of *Deecy Products Co. v. Welch* (C.C.A. 1st) 124 F.(2d) 592, 594, urged that an individual by virtue of being a corporate officer is an employee *per se*, and that there is no alternative construction that may be placed upon Section 1101 (a) (6) of Title XI of the Social Security Act. In refusing to accept the Government's construction of Section 1101 (a) (6) of Title XI of the Social Security Act, the court declared:

> "We cannot accept the government's construction. We believe with the taxpayer that Section 1101 (a) (6) means that an officer *can* be an employee. In other words, if he meets the test determinative of the ordinary employment relationship, he is an employee and the fact that he is also an officer of the corporation does not destroy his status as an employee under the Act."

The court continued:

> "There is a definite reason why Congress should have enacted Section 1101 (a) (6) even though it is taken to mean that a corporate officer *can* be an employee. In enacting this section it is far more likely that Congress was directing its attention to the very real dispute whether a corporate officer was the type of person intended to be protected by remedial state acts, rather than any dispute about corporate officers meeting the ordinary employment relationship tests. The fact is that there was a great dispute in the state

courts on the question whether a corporate officer was the type of person intended to be covered by the statutes, and there was no such dispute on the question whether corporate officers met the ordinary employment relationship tests. In the absence of Section 1101 (a) (6) it could have been argued that granting the ordinary employment relationship existed with respect to corporate officers, still these superior employees were not intended to be covered by the Act. For that reason Congress might well have felt the necessity of insertng such a section as Section 1101 (a) (6) in the Act so it would be clear that the Act covered superior employees, as well as inferior employees." (Italics ours)

The cases of *United States v. Griswold* (C.C.A. 1st, 1941) 124 F.(2d) 599, and *Indepedent Petroleum Corp. v. Fly* (C.C.A. 5th) 141 F.(2d) 189, are in accord with the construction placed upon Section 1101 (a) (6) of Title XI of the Social Security Act by the court in *Deecy Products Co. v. Welch* (C.C.A. 1st) 124 F.(2d) 592, to the effect that a corporate officer *can* be an employee under Section 1101 (a) (6) of Title XI of the Social Security Act if the relationship of employer-employee exists (Italics ours).

It is submitted that the Aerie physicians in question are not in the true sense of the word corporate officers, and it is apparent from an analysis of the testimony and the Constitution for Subordinate Aeries (Appellee's Exhibit 6) that the necesary elements of control and supervision as to the manner and method to be employed in performance of the services rendered are not present. Therefore it is

futile to contend that there exists in the instant case the legal concept of an employer-employee relationship.

2. Ritualistic Officers of a Fraternal Organization were not intended to be included as employees within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935.

Appellee urges that ritualistic officers such as the Worthy President, Worthy Vice-President, Worthy Treasurer and Worthy Trustees of the respective Aeries of the Fraternal Order of Eagles were not intended by Congress to be included within the terms and provisions of Title VIII and Title IX of the Social Security Act of 1935.

The district court adopted the interpretation that to include such officers within the provisions of the Social Security Act would require an absurd and strained construction of the Act and Regulation (R. 79-81).

A material fact to be considered in construing the Act is that the ritualistic officers in question received a most nominal compensation—for instance: the Worthy President $1.00 a quarter (R. 145, 156, 157); the Worthy Treasurer $1.00 per month (R. 213) and the Trustees $1.00 per quarter (R. 146). The district court classified this compensation as mere honorariums (R. 81).

Another significant fact is that each of the officers involved was regularly employed and by virtue of such employment was adequately protected so as to insure them the benefits emanating from the Social Security Act (R. 215).

There can be no question that when Titles VIII and IX of the Social Security Act were enacted, Congress intended through this medium to accord to the citizenry of the United States a panacea from the unfortunate consequences of unemployment. It is apparent that the desire behind this particular Act was to protect the men and women of our country from the hardships of the poor house, as well as from the haunting insecurity that awaits one when the voyage of life is rapidly terminating.

Can it be reasonably and logically concluded that the intention of Congress when they enacted the Social Security Act was two-fold, namely: (1) to include within its provisions an individual regularly engaged in his customary occupation or business and, (2) to include within its provisions this *same* individual who once a week participated in the work of a fraternal organization as a ritualistic officer and receiving compensation as nominal as 33 1/3c per month? Congress had no such intention and such a interpretation is an absurdity.

Congress, in a sincere desire to express its true intention and to clarify and correct an unfortunate situation, in 1939, amended Title VIII and Title IX of the Social Security Act, providing that any organization or individual who was exempt from income tax under Section 101 of the Internal Revenue Code would not be required to pay a tax upon ritualistic officers or upon any individual who earned less than $45.00 during a calendar quarter. This action on the part of Congress is sufficiently convincing to allow this court to conclude that Congress never in-

tended ritualistic officers of a fraternal organization to be included as employees under the terms and provisions of the Social Security Act.

It has been stated repeatedly that in determining the real purpose of a particular act or statute it is customary for the courts to go beyond the words contained in the statute or act. A demonstration of this custom by the courts relative to construing the purpose of a particular statute is found in the case of *United States v. American Trucking Association*, 310 U.S. 534, 543:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose rather than the literal words."

The court condemns a literal construction of statutes which result in absurdities in the case of *Sorrells v. United States*, 287 U.S. 435, 450:

> "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. Judicial nullification of statutes, admittedly valid and

applicable has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction confessedly contrary to public policy and then to decline to enforce it."

Appellee submits that the district court reasonably and logically construed the purpose of the Social Security Act when it declared that ritualistic officers of a fraternal organization, exempt from income tax under Section 101 of the Internal Revenue Code, were not intended by Congress to be included within its terms and provisions (R. 79-81).

3. Services performed by the Worthy President, Worthy Vice-President, Worthy Treasurer, Worthy Trustees and the Musician are principally ritualistic and do not constitute Employment for the purposes of Titles VIII and IX of the Social Security Act.

Appellant argues that the services performed by the officers of the appellee were not exclusively ritualistic, and therefore constitute employment for the purpose of the Social Security Act.

Appellant has in its brief attempted to enumerate the administrative duties of the various ritualistic officers in issue, but has neglected to incorporate in its argument the ritualistic services required of these officers in the Constitution for Subordinate Aeries (Appellee's Exhibit 6).

The court's attention is directed to the Constitution

for Subordinate Aeries (Appellee's Exhibit 6) which will establish that the ritualistic services performed by the officers in issue were not incidental to their administrative duties.

For the purpose of illustration, appellee desires to set forth the ritualistic requirements of the Worthy President provided for in the Constitution for Subordinate Aeries (Appellee's Exhibit 6): To preside at all meetings; to appoint all officers pro tem in the place of absentees; to communicate a semi-annual pass word to each member; to preserve order and decorum; to enforce provisions of the ritual; and he shall have no authority to aid or dispense with any part of the ritualistic ceremony (Art. 9, Sec. 1, p. 16); to decide all questions of order (Art. 9, Sec. 2, p. 17); to cast the deciding vote on all questions on which there may be an equal division of the members (Art. 9, Sec. 3, p. 17); to inspect all ballots (Art. 9, Sec. 7, p. 17); to cause to be read all official correspondence and circulars (Art. 9, Sec. 11, p. 18); to have charge and custody of the rituals and other secret work of the Order and to keep them in a secure place in the Aerie (Art. 9, Sec. 12, p. 18); to appoint all committees and be an ex-officio member of all committees (Art. 9, Sec. 14, p. 18); to visit or cause such member to be visited who becomes ill (Art. 9, Sec. 17, p. 18); upon the death of any member to make the necessary preparations for the funeral, and to render proper services (Art. 39, Sec. 1, p. 75); and to appoint pallbearers (Art. 39, Sec. 2, p. 76); to impose fines on members of the Aerie who are guilty of disorderly behavior at any meeting

(Art. 49, Sec. 6, p. 94); to appoint three or more members of the Aerie as members of the committee on investigation (Art. 26, Sec. 1, p. 44); to appoint an old-age pension committee of not less than three members of the Aerie (Art. 25, Sec. 1, p. 43); to fine any member of the visiting committee in a sum not exceeding $1.00 for their failure to make visitation to the sick (Art. 21, Sec. 5, p. 40); to memorize the Order's ritual within sixty days after his installation (Art. 1, Sec. 6, p. 4).

Appellee submits that all ritualistic officers in issue perform services or duties that are principally ritualistic, and that appellant's argument to the effect that the ritualistic duties of these officers are incidental to the administrative services is without merit. From a close scrutiny and analysis of the testimony introduced in this cause, and of the Constitution for Subordinate Aeries (Appellee's Exhibit 6) it immediately becomes apparent that the ritualistic services performed by the officers of the appellee are of primary importance, and are the exclusive medium and method of furthering and executing the humanitarian, beneficial, social and fraternal objectives of the Fraternal Order of Eagles.

It has been decided that these same ritualistic officers of Ballard Aerie No. 172 of the Fraternal Order of Eagles were not in employment within the meaning of the Washington Unemployment Compensation Act (Rem. Rev. Stat. of Washington, Section 9998-102-119q). (April 18, 1942, C.C.H. Unemployment Service, Vol 6, par. 8111-04, Washington):

"Petitioner's President receives $4.00 a year

> salary. It is his duty under petitioner's Constitution to preside at all meetings, to appoint all officers pro tem in place of absentees, to communicate the pass word, to preserve order, to enforce the ritual and the Constitution of petitioner, to cast the deciding vote in cases of a tie, to sign all warrants, checks, reports and other documents, to appoint committees, and to conduct elections. The petitioner also employs a Vice-President who also receives $4.00 a year and whose duties are mainly to assist the President. Held: The evidence and petitioner's Constitution very definitely establish that the services of the petitioner's President and Vice-President are *principally ritualistic* in nature and that their administrative activities are largely incidental thereto. Therefore, their services do not constitute employment." (Italics ours)

Concerning the status of the Musician in the Ballard Aerie case, the District Court concluded that he was not an employee within the meaning of the Social Security Act. (R. 81-82).

The Musician is appointed by the Worthy President and is an officer of the Aerie. His duties consist of playing the piano for the opening and closing of ritualistic ceremonies and during the initiatory services at the weekly meetings of the Aerie, for which he receives as compensation $2.00 to $2.50 per meeting (R. 200-202). It is the position of the appellee that the Aerie Musician was never intended to be included within the terms and provisions of the Social Security Act and that the services rendered by him are principally ritualistic.

Appellee contends that the ritualistic officers are

exempt from the operation of the Social Security Act for the reasons that Congress never intended to include such individuals within the terms and provisions of the Act, and that the services rendered by these officers are principally ritualistic.

CONCLUSION

I.

That the judgment of the District Court should be sustained concerning the question of the status of the Aerie physicians because it is obvious from the evidentiary facts that the Aerie physicians were not employees within the meaning of Title VIII and Title IX of the Social Security Act, but were quite clearly independent contractors.

II.

The ritualistic officers of a fraternal organization were never intended by Congress to be included within the terms and provisions of Titles VIII and IX of the Social Security Act.

III.

That the services rendered by the ritualistic officers and a musician to the respective Aeries were principally ritualistic and therefore could not constitute employment within the meaning of Titles VIII and IX of the Social Security Act.

Respectfully submitted,

CORNELIUS C. CHAVELLE,
Attorney for Appellee.

Of Counsel:
CHAVELLE & CHAVELLE.

APPENDIX A

Social Security Act, c. 531, 49 Stat. 636

TITLE VIII.—EMPLOYMENT TAXES

SECTION 801. * * *, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in Section 811) received by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (26 U.S.C.A. §1400).

SEC. 804. * * *, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 811) paid by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (26 U.S.C.A. 1410).

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, * * *.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer.

TITLE IX.—TAX ON EMPLOYERS OF EIGHT OR MORE

SECTION 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year: (26 U.S.C.A. 1600).

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, * * *.

as to *what* shall be done but *how* it shall be done. In

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer. (26 U.S.C.A. 1607).

TITLE XI — GENERAL PROVISIONS

SECTION 1101. (a) When used in this Act—

(6) The term "employee" includes an officer of a corporation.

SEC. 1426 (as amended by the Social Security Act Amendments of 1939, effective January 1, 1940, Sec. 606). DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, * * *.

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *.

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, * * *.

(26 U.S.C.A. 1426).

SEC. 1607 (as amended by the Social Security Act Amendments of 1939, Sec. 614). DEFINITIONS.

When used in this subchapter—

(b) The term "wages" means all remuneration for employment, * * *.

(c) The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, * * * except—

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such soicety, order, or association, * * *.

APPENDIX B

REGULATIONS

Treasury Regulations 91, concerning Title VIII of the Social Security Act:

ART. 3. *Who are employees.*—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in Section 811 (b) (see article 2).

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual perform-

ing services as an independent contractor is not as to such services a employee.

Generally physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Treasury Regulations 90, concerning Title IX of the Social Security Act:

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in Section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

* * * * * * * * *

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic

of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

No. 10687

United States

Circuit Court of Appeals

For the Ninth Circuit.

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC.,

Appellant,

ve.

JOHN H. BUNDENSEN, HOWARD F. LAURITZEN and BUNDENSEN AND LAURITZEN, a Co-partnership,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

FILED
MAY 26 1944
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10687

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Libel	20
Answer to Libel as Amended	23
Assignment of Errors	236
Citation on Appeal	243
Clerk's Certificate	247
Cost Bond on Appeal	239
Counter-Praecipe by Respondents for Apostles on Appeal	245
Decree	233
Deposition of Adrian A. Westall	42
—direct	43
—cross	56
—redirect	64
—recross	73
—redirect	74
Exceptions to Libel	17
Order Sustaining	20
Final Decree	233
Findings of Fact and Conclusions of Law	225
Interrogatories Propounded to Libelant, on Libel as Amended, and Answers by Ed. M. Foy	35

Index

Page

Interrogatories Propounded to Respondents and Each of Them, and Answers by Howard F. Lauritzen 8

Libel for Damages 2

Amendment to 20

Libelant's Notice of Appeal and Petition for Allowance Thereof 235

Libelant's Praecipe for Apostles on Appeal 241

Minute Order of October 12, 1942—Sustaining Exceptions to Libel 20

Minute Order of July 22, 1943—Trial and Introduction of Respondents' Exhibits 41

Minute Order of August 3, 1943—Case Ordered Submitted 77

Minute Order of August 11, 1943—Entering Decree in Favor of Respondents and Dismissing Libel as Amended 224

Minute Order of September 7, 1943—Entering Final Decree in Favor of Respondents 234

Notice of Appeal by Libelant, and Petition for Allowance Thereof 235

Order Dismissing Amended Libel 225

Order Extending Time to Docket to February 4, 1944 246

Order Extending Time to Docket to February 18, 1944 246

Index Page

Praecipe by Libelant for Apostles on Appeal..... 241

Reporter's Transcript of July 22, 1943..... 78

Libelant's Exhibits:

No. 1—Invoice of Stockton Sand & Crushed Rock Co. to Bundesen & Lauritzen, dated June 30, 1941 178

No. 2—Bundesen & Lauritzen Daily Time Card—May 16, 1941..... 188

No. 3—Bundesen & Lauritzen Daily Time Card—May 19-21, 1941..... 190

No. 5—Statement of Adrian A. Westall taken May 22, 1941..... 210

Libelant's Witness:

Foy, Ed. M.

—direct 83
—cross 87
—redirect 108
—recross 111
—direct (rebuttal) 216

Foy, Ralph Ledingham

—direct 128
—cross 146
—redirect 164
—direct (rebuttal) 218
—cross 222

Index Page

Libelant's Witnesses (cont.):

Foss, Henry

—direct 118
—cross 121
—redirect 125

Smith, Thomas W.

—direct 111
—cross 113
—redirect 116

Respondents' Exhibits:

A—Bill of May 21, sent to Bundesen & Lauritzen 88

B—Letter of May 29, 1941, from Bundesen & Lauritzen to Stockton Sand and Crushed Rock Co. 89

C—Invoice of Stockton Sand and Crushed Rock Co. dated May 31, 1941, to Bundesen & Lauritzen 93

D—Invoice of Stockton Sand and Crushed Rock Co. to Bundesen & Lauritzen dated May 31, 1941 94

E—Letter of Stockton Sand and Crushed Rock Co. to Bundesen & Lauritzen dated July 8, 1941 96

Index Page

Respondents' Witnesses:

Kitchen, Robert P.

—direct 196
—cross 205
—redirect 215

Lauritzen, Howard F.

—direct 168
—cross 176

Respondents' Counter-Praecipe for Apostles on Appeal 245

Stipulation—Transmitting Original Exhibit to Circuit Court of Appeals 244

NAMES AND ADDRESSES OF PROCTORS

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Stockton, California.

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San Francisco, California.
Proctors for Libelant and Appellant.

Messrs. DERBY, SHARP, QUINBY and TWEEDT,
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San Francisco, California.
Proctors for Respondents and Appellee.

In the Southern Division of the United States District Court for the Northern District of California, in Admiralty.

No. 23,686-R

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC., a corporation,

Libelant,

vs.

JOHN R. BUNDENSEN; HOWARD F. LAURITZEN; BUNDENSEN AND LAURITZEN; X CORPORATION; JOHN DOE; and PETER POE,

Respondents.

DERRICK BARGE "FOY 2"
LIBEL FOR DAMAGES

To the Honorable, the Judges of the Southern Division of the United States District Court for the Northern District of California:

The libel of Stockton Sand and Crushed Rock Company, Inc., a Corporation, libelant, in causes of action civil and maritime against respondents above named, respectfully alleges:

I.

Libelant is a corporation duly organized and acting under the laws of the State of California, and at all times herein mentioned and concerned was

and is the owner of the derrick barge "Foy 2", a commercial vessel of the United States of America. [1*]

II.

Libelant is informed and believes, and therefore alleges, that respondents John R. Bundensen and Howard F. Lauritzen are doing business under the firm name and style of Bundensen and Lauritzen.

III.

Respondents X Corporation, John Doe and Peter Poe are the fictitious names of respondents whose names are to this libelant unknown, and libelant asks that, when such true names are discovered, this libel may be amended by inserting such true names in the place and stead of such fictitious names.

IV.

On or about May 5, 1941, libelant was in possession of said derrick barge "Foy 2" which then had a reasonable and actual value of $40,000.00.

V.

On or shortly before May 5, 1941, respondents inspected said "Foy 2" as to engines, derrick, hull and gear, and accepted her in her then condition for their purposes as herein set forth.

VI.

Respondents then and thereupon requested libelant, and libelant thereupon demised and chartered

*Page numbering appearing at foot of page of original certified Transcript of Record.

to respondents; and respondents accepted, chartered and took custody and possession of said "Foy 2" and then and thereafter operated her. Said matters were orally agreed, on or shortly before May 5, 1941.

VII.

Said charter and demise was a "bare-boat charter" whereunder, not the libelant, but solely the respondents employed and controlled and directed the captain, engineer, operators and crew of said "Foy 2" as their, respondents', employees and crew; and respondents contracted and agreed with libelant to return said [2] "Foy 2" to libelant at the end of said charter and temporary possession of respondents, in her then or equal order and condition, reasonable wear and tear only excepted.

VIII.

Respondents advised libelant that they contemplated use of said "Foy 2" in or near Solano County, California, for a completion of a certain job then contemplated by respondents, and agreed to deliver her back to libelant on the completion of said job. Said job is completed. The reasonable time of duration of said charter and demise and job has terminated.

IX.

Libelant has heretofore demanded return of said "Foy 2" as above agreed, or that failing, payment of her said value, but respondents and each of them have failed and refused either to return said "Foy

2'' or to pay her value, excepting only that respondents did return to libelant certain relict and damaged portions of said ''Foy 2'' of a value of $500.00, all to libelant's damage in the sum of $39,500.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

And for a Further, Separate and Second Cause of Libel, Libelant Alleges:

XI.

Libelant incorporates herein all of the paragraphs of its first cause of libel herein, and refers to the same as though more fully set forth herein.

XII.

Libelant is informed and believes and thereupon alleges that respondents and each of them so carelessly and negligently used, [3] cared for, and mishandled said barge ''Foy 2'', and so failed to take proper care of said barge ''Foy 2'' that therein and thereby said ''Foy 2'' has been badly damaged by fire; that the reasonable cost of repairing said ''Foy 2'' is the sum of $39,500.00, all to libelant's damage in the sum of $39,500.00.

XIII.

Libelant is informed and believes, and thereupon alleges, that respondents were negligent in the afore-

said matters and things in the following particulars (among others which will be shown at the trial of this cause, and in which particulars libelant hereby prays that this libel may be amended and supplemented):

(a) Starting a fire in the firebox without properly inspecting the condition thereof and also without leaving an attendant to watch said fire, but on the contrary in deliberately leaving said fire entirely unattended after starting the same.

(b) Thereafter, hearing a noise of a suspicious nature in the manner of the puff of a small explosion or fire, in not ascertaining the cause of said noise or fire, or sending any attendant to said noise immediately.

(c) In later taking improper measures to arrest and prevent the spread of said fire and particularly, entirely neglecting to use any fire extinguisher for said purpose.

(d) In not sufficiently manning said "Foy 2" with careful, prudent and capable men and crew.

(e) In ordering or permitting the fire to be thus generated in said "Foy 2" with only one employee aboard, and particularly when that one employee did not remain in constant attendance at the fire during such periods as lighting the fire.

(f) In failing to properly care for said "Foy 2" and particularly to guard her against fire. [4]

Wherefore, libelant prays that process and citation in personam in due form of law and according to the practice of this Honorable Court in cases of

admiralty and maritime jurisdiction or admiralty foreign attachments may issue against the respondents above named and each of them to answer the libel herein and to answer all and singular the interrogatories attached to the libel, and that this Court decree the payment by respondents and each of them to libelant of the aforesaid damages, together with interest thereon and costs of suit herein, and that libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

DARRAH & ELLIS
SINGLE, BRYANT, COOK
& HERRINGTON
Proctors for Libelant

State of California,
County of Santa Cruz—ss.

Ed M. Foy, being first duly sworn, deposes and says:

I am an officer, to-wit, the Secretary-Treasurer of Stockton Sand and Crushed Rock Company, Inc., libelant herein; I have read the libel and it is true, except as to those portions alleged upon information and belief, and as to those portions, I believe it to be true.

ED. M. FOY
Sec.-Treas.

Subscribed and sworn to before me this 9th day of July, 1942.

[Seal] JENNIE L. JONES

Notary Public in and for the County of Santa Cruz, State of California.

My Commission Expires May 6, 1946.

[Endorsed]: Filed Jul 10 1942. Walter B. Maling, Clerk. [5]

INTERROGATORIES PROPOUNDED TO RESPONDENTS AND EACH OF THEM AND ANSWERED BY HOWARD F. LAURITZEN

Interrogatory No. 1.

Did not respondents inspect the "Foy 2" before taking her?

Answer.

No. Respondents saw the "Foy 2" but did not inspect her condition.

Interrogatory No. 2.

Did not respondents accept the "Foy 2" in her then condition after their inspection?

Answer.

No. Respondents relied, in contracting for the service of the "Foy 2", upon libelant's warranty of her seaworthiness and fitness for the intended service.

Interrogatory No. 3.

Did not respondents then take possession and control of the "Foy 2"?

Answer.

No.

Interrogatory No. 4.

Did not a fire occur on the "Foy 2"?

Interrogatory No. 5.

When and where did the fire occur?

Answer (to Interrogatories 4 and 5).

A fire occurred on the "Foy 2" shortly after 4 A. M. on May 21, 1941, a short distance northerly of Vallejo, California.

Interrogatory No. 6.

At that time who employed the crew of the "Foy 2"?

Answer.

Respondents secured the crew of the "Foy 2" at the request of and for the account of libelant who had agreed to furnish and pay a crew. [6]

Interrogatory No. 7.

At that time who controlled and directed her crew?

Answer.

The interrogatory is indefinite and calls for a conclusion. At the time the fire commenced, there was one man aboard the barge, the fireman. In general, respondents specified the work to be done by

the barge. Libelant presumably, pursuant to the agreement for the service of the barge, controlled and directed the crew as to the operation of the barge.

Interrogatory No. 8.

a. What men were on board the "Foy 2" at the time of the fire?

b. Who employed,

c. paid and

d. controlled them?

Answer.

a. A. A. Westall, fireman, at the time the fire commenced.

b. Answered in answer to Interrogatory 7 above.

c. Respondents advanced wages to A. A. Westall in the first instance for the three days' work previous to the date of the fire and were reimbursed for such advance by libelant.

d. Answered in answer to Interrogatory 7 above.

Interrogatory No. 9.

At the time of the fire who was in charge of the "Foy 2" and who hired and controlled him?

Answer.

Answered in answers to Interrogatories 7 and 8 above.

Interrogatory No. 10.

How many men are necessary

a. To safely operate the "Foy 2" during her work?

b. To safely man the "Foy 2" while her fires are lighted? [7]

Answer.

a. Presumably two, since libelant agreed to furnish a crew consisting of an engineer and a fireman.

b. Presumably one, since libelant furnished one fireman.

Interrogatory No. 11.

State what means of fire fighting, such as pumps, buckets filled with water, hoses, extinguishers, were available on the "Foy 2" and their location.

Answer.

Respondents have no inventory of such means of fire fighting. However, all fire fighting equipment which was on the barge at the time libelant brought the barge to the place of the intended work or placed thereon by libelant thereafter, was still on the barge at the time of the fire.

Interrogatory No. 12.

State which, if any, of those fire fighting means were used when the "Foy 2" caught on fire, and the manner of use, and who performed the fighting.

Answer.

Respondents answer on information and belief that fireman Westall attempted to smother out the fire with sacking and pieces of clothing when he first observed it. Respondents understand that thereafter fireman Westall was assisted by engineer Williams, R. P. Kitchen and certain members of the Vallejo

fire department who succeeded in extinguishing the fire.

Interrogatory No. 13.

What was the origin of the fire which damaged the "Foy 2"?

Answer.

The exact origin of the fire is unknown to respondents. Respondents state on information and belief that fireman Westall started a fire in the fire box of the boiler in the usual way in which he had been instructed by libelant; the burner [8] appeared to operate all right; shortly thereafter, there was a light explosion and oil and flame reached the floor or deck around the boiler.

Interrogatory No. 14.

State the manner in which the fires were lighted in the "Foy 2's" fire box on the occasion when she burned, and who did the lighting.

Answer

Respondents answer on information and belief that fireman A. A. Westall lighted the fire in the fire box by placeing and lighting a burning rag in the fire box to ignite the fuel oil.

Interrogatory No. 15.

How many men were on the "Foy 2" when the fire was lighted in her fire box on the occasion of her burning?

Answer.

One.

Interrogatory No. 16.

When was the discovery made that the "Foy 2" was on fire, and who made the discovery?

Answer.

Respondents answer on information and belief that A. A. Westall saw the fire around the boiler about 4 A. M.

Interrogatory No. 17.

At the time the "Foy 2" was discovered to be afire, what was the then location and extent of the fire?

Answer.

Respondents answer on information and belief that the fire was first observed on the deck or floor near the boiler.

Interrogatory No. 18.

When a fire is to be started in the "Foy 2's" fire box [9]

a. Should not more than one person be aboard to act if an emergency by fire occurs?

b. Should not one man remain in constant attendance at the fire box to observe and control the fire within the fire box and to safeguard against portions of the ship catching fire?

Answer.

Respondents cannot answer this conjectural and argumentative question with respect to the operation of libelant's barge.

Interrogatory No. 19.

What inspection of the fire box on the "Foy 2", or preparation thereof, was made before the fires were lighted on this occasion, and who performed the inspection or preparation?

Answer.

Respondents answer on information and belief that A. A. Westall examined the fire box, observed the air pressure, the fuel flow, and after lighting the fire observed that it was apparently burning properly.

Interrogatory No. 20.

Prior to the time that the "Foy 2" was discovered by someone to be afire, what was that person doing and where was he?

Answer.

Respondents answer on information and belief that Westall was standing on the deck of the barge a short distance from the fire box.

Interrogatory No. 21.

How long after the fires were started in the "Foy 2's" fire box was it before the dredge herself was discovered to be on fire?

Answer.

Respondents answer on information and belief that it was about five minutes from the time the fire was started in the [10] fire box until fire was observed in the floor or deck around the boiler.

Interrogatory No. 22.

After someone had lighted the fires in the "Foy 2's" fire box on this occasion, what further care or attention was given to the fire box, and by whom was it given?

Answer.

Respondents answer on information and belief that fireman Westall observed the satisfactory operation of the burner for two or three minutes after the fire was started in the fire box, before turning away from the fire box.

Interrogatory No. 23.

On how many previous occasions had the person who fired the "Foy 2" on this occasion, fired her?

Answer.

Respondents do not know.

Interrogatory No. 24.

In answer to the above interrogatories various persons will have been indicated, either by name or position in each case, as of the date in question, state:

a. Who had hired that person?

b. Who had paid that person up to that date?

c. Who controlled that person and gave him his orders on that date?

Answer.

Answered in answer to Interrogatories 6, 7 and 8 above.

Interrogatory No. 25.

Please list all men employed on the "Foy 2" on this occasion, stating the position each filled and his experience in that capacity. [11]

Answer.

A. A. Westall, fireman, 15 years' experience.

..... Williams, engineer, 15 years' experience.

Interrogatory No. 26.

State whether the respondents Bundensen and Lauritzen comprise a corporation or a partnership, and if the latter, state the names and addresses of the members of the partnership.

Answer.

Partnership.

James R. Bun*des*en, Central Avenue, Pittsburg, California.

Howard F. Lauritzen, 214 Ninth Street, Antioch, California.

Interrogatory No. 27.

Did any other person, corporation, or other entity have control over the men employed on the "Foy 2" on the day of the fire, and if so, state names, addresses and extent of control?

Answer.

The interrogatory is ambiguous, but as stated above, the crew of the "Foy 2" were under the sole control of libelant with respect to the operation of the barge, so far as known to respondents.

Interrogatory No. 28.

If Bundensen and Lauritzen is a partnership, is it a general or limited partnership? If a limited partnership, state name and address of general partner.

Answer.

General partnership.

(Verification)

(Receipt of service)

[Endorsed]: Filed Sep. 21, 1942. [12]

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

The exceptions of James R. Bundesen, Howard F. Lauritzen, and Bundesen & Lauritzen, to the libel herein respectfully allege:

I.

Said libel does not state facts sufficient to constitute a cause of libel against said respondents or any of them.

II.

The first alleged cause of libel does not state facts sufficient to constitute a cause of libel against said respondents or any of them. [13]

III.

The second alleged cause of libel does not state facts sufficient to constitute a cause of libel against said respondents or any of them.

IV.

Said libel does not allege facts showing a cause within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

V.

The first alleged cause of libel does not state facts showing a cause within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VI.

The second alleged cause of libel does not allege facts showing a cause within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VII.

Except to the sufficiency, fullness, distinctness and competency of Article VI of said libel, and to said Article VI as incorporated in the second alleged cause of action, in that the same are merely allegations of conclusions and not of fact, and said Article VI should be stricken.

VIII.

Except to the sufficiency, fullness, distinctness and competency of Article VII of said libel, and to said Article VII as incorporated in the second alleged cause of action, in that the same are merely allegations of conclusions and not of fact, and said Article VII should be stricken.

IX.

Except to the relevancy and competency of the allegation [14] contained in Article XII of the second alleged cause of action relative to the cost of repairing said "Foy 2" and libelant's alleged damage in the sum of $39,500.00, in that said allegations do not constitute the proper legal basis of libelant's alleged damage.

X.

Except to the sufficiency, fullness and distinctness of said libel, and of each alleged cause of action therein, in that said libel fails to set forth the terms and provisions of said alleged charter.

Wherefore, said Respondents pray that the foregoing exceptions be sustained and that said libel be dismissed with costs to respondents.

September 21, 1942.

DERBY, SHARP, QUINBY & TWEEDT
Proctors for Respondents
James R. Bundesen, Howard F. Lauritzen, and Bundesen & Lauritzen

(Receipt of Service)

[Endorsed]: Filed Sep. 21, 1942. [15]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof,

in the City and County of San Francisco, on Monday, the 12th day of October, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER SUSTAINING EXCEPTIONS TO LIBEL; ETC.

This cause came on regularly this day for hearing on Exceptions to Libel, whereupon after hearing the arguments of Mr. Shingle for Libelant and Mr. Tweedt for Respondent, it is ordered that the Exceptions to the Libel be and the same are hereby sustained, with ten (10) days within which to amend. [16]

[Title of District Court and Cause.]

DERRICK BARGE FOY No. 2
AMENDMENT TO LIBEL

On hearing of Respondents' exceptions to libel, the Court having ordered Libelant to more particularly allege the oral chartering herein concerned, now, in compliance therewith, Libelant respectfully amends its Libel and Article VI thereof to read as follows:

VI. Respondents then and thereupon requested Libelant, and Libelant thereupon demised and chartered to Respondents; and Respondents accepted, chartered and took custody and possession of said

"Foy No. 2" and then and thereafter operated her. Said matters were orally agreed, on or shortly before May 15, 1941, at which time Respondent Lauritzen, for said Respondents, telephoned the office of Libelant in the San Pablo Hotel, Oakland, California, [17] speaking to Captain Ed Foy, asking how much would be charged by Libelant, who advised he had no crew to supply, to which Lauritzen said that he would furnish the crew, and Foy offered to supply the derrick barge at $80 per day of eight hours employment, including fuel oil, Lauritzen to use his own engineer and fireman and pay them, but such amounts to be deducted from rental of derrick. Lauritzen also stated he had seen the derrick barge and knew what it was. Lauritzen asked if Libelant had insurance on the Foy No. 2, to which Foy answered it did. Lauritzen requested Libelant to deliver the Foy No. 2 to Respondents above Sears Point bridge in the navigable waters of Solano County at Respondents' expense of delivering for towing to Respondents' job, and Respondents to return it to Libelant or to pay for return towing on Respondents' completion of the job; as Respondents wanted it for two or three weeks. At said time Libelant did not know the engineer or fireman to be employed or thereupon or thereafter employed by Respondents, and Libelant so delivered said derrick barge to Respondents.

DARRAH & ELLIS
SINGLE, BRYANT, COOK
& HERRINGTON
Proctors for Libelant

State of California,
County of—ss.

Ed M. Foy, being first duly sworn, deposes and says:

I am an officer, to wit, Secretary-Treasurer of Stockton Sand and Crushed Rock Company., Inc., Libelant herein. I have read the amendment to Libel and it is true.

ED M. FOY

Subscribed and sworn to before me this 13th day of October, 1942.

VERA C. WILKINS
Notary Public in and for the County of Alameda, State of California.

My Commission Expires May 23, 1944.
[Seal]

Receipt of a copy of the within Amendment to Libel is hereby admitted this 14th day of October, 1942.

DERBY, SHARP, QUINBY & TWEEDT
Proctor for Respondents

[Endorsed]: Filed Oct. 16, 1942. [18]

[Title of District Court and Cause.]

ANSWER TO LIBEL AS AMENDED

To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division:

The answer of respondents, James R. Bundesen (sued as John R. Bundensen), Howard F. Lauritzen and Bundesen and Lauritzen (sued as Bundensen and Lauritzen), to the libel herein, as amended, admits, denies and alleges as follows:

I.

Said respondents are not informed concerning the matters alleged in Article I of said amended libel, wherefore they deny the same and call for strict proof thereof if and so far as material. [19]

II.

Answering unto the allegations of Article II of said amended libel, said respondents allege that James R. Bundesen and Howard F. Lauritzen are copartners doing business under the firm name and style of Bundesen & Lauritzen.

III.

Said respondents are not informed concerning the matters alleged in Article III of said amended libel, wherefore they call for strict proof thereof if and so far as material.

IV.

Answering unto the allegations of Article IV of said amended libel, said respondents admit that on or about May 5, 1941, libelant was in possession of the derrick barge known as "Foy 2"; deny that said derrick barge then or at any time thereafter, or at all had a reasonable and actual, or reasonable or actual, value of $40,000.00, or any other sum at all except as hereinafter alleged. Respondents are informed and believe, and therefore allege that said derrick barge had a value of approximately Five Thousand ($5,000.00) Dollars at all times referred to in said amended libel.

V.

Answering unto the allegation of Article V of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained.

VI.

Answering unto the allegations of Article VI of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained, except as hereinafter alleged and admitted. In this respect, said respondents allege that on or about the 13th day of May, 1941, libelant and respondent Bundesen & Lauritzen made an oral agreement for the services of the derrick [20] barge "Foy No. 2" as follows:

Libelant agreed to furnish to said respondent Bundesen & Lauritzen the services of the derrick

barge "Foy No. 2" in connection with a construction job being performed by said respondents near Vallejo, California. Libelant agreed to furnish such services until the completion of the said construction job provided said respondents found that the said barge was suitable and capable of performing the contemplated services. Libelant agreed to furnish the services of said barge as aforesaid for the charge of $10.00 per hour of actual use for eight hours per day or less with a minimum charge for four hours on any day the barge was steamed up, and to furnish and pay for an engineer or operator of the barge, a fireman, water, fuel, oil and full hull insurance. Libelant agreed to keep said barge fully insured for the benefit of the parties. Libelant warranted that the barge was in good condition and ready to perform the contemplated services. Respondent Bundesen & Lauritzen, on their part, agreed to pay said hourly charge for said services for each hour of actual services with the minimum charge as aforesaid. Respondent Bundesen & Lauritzen further agreed to pay the cost incurred by libelant in towing said barge from Oakland to the place of the said construction work and in towing her back to Oakland upon the completion of the services.

VII.

Answering unto the allegations of Article VII of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained. Said respondents allege that respondent

Bundesen & Lauritzen contracted with libelant for the services of the derrick barge "Foy 2" on the terms set forth in paragraph VI hereinabove. [21]

VIII.

Answering unto the allegations of Article VIII of said amended libel, said respondents deny each and every, all and singular, the allegations therein contained, except that respondent Bundesen & Lauritzen admit that they advised libelant that the services of the "Foy 2" were desired on a construction job near Vallejo in Solano County and that said job has been completed.

IX.

Answering unto the allegations of Article IX of said amended libel, respondents deny each and every, all and singular, the allegations therein contained, except respondents admit they have not paid the alleged value of said "Foy 2". Respondents allege that said "Foy 2" was at all times referred to in said amended libel in the possession and under the control of libelant.

X.

Answering unto the allegations of Article X of said amended libel, said respondents deny that all and singular, or all or singular, the premises are true, except as herein expressly admitted, but admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

And further answering unto said amended libel and unto the Second alleged cause of libel therein, said respondents admit, deny and allege as follows:

XI.

Answering unto the allegations of Article XI of said second alleged cause of libel wherein libelant incorporates all of the paragraphs of its first alleged cause of libel, said respondents hereby refer to their answers thereto set forth above herein in Article I to X inclusive, and by such reference expressly incor- [22] porate said answers herein as though fully set forth in full hereat.

XII.

Answering unto the allegation of Article XII of said Second alleged cause of libel, said respondents deny each and every, all and singular the allegations therein contained. In this respect, said respondents allege that said "Foy 2" was damaged by fire while in the possession, control and custody of libelant at the location of said construction job of respondent Bundesen & Lauritzen.

XIII.

Answering unto the allegations of Article XIII of said Second alleged cause of libel, said respondents deny each and every, all and singular, the allegations therein contained.

And further answering unto said Amended Libel and unto each alleged cause of action therein, and by way of a First, Separate and Affirmative Defense thereto, respondents allege as follows:

I.

On or about the 13th day of May, 1941, libelant and respondent Bundesen & Lauritzen made an oral agreement for the services of the derrick barge "Foy No. 2" as follows:

Libelant agreed to furnish to said respondent Bundesen & Lauritzen the services of the derrick barge "Foy No. 2" in connection with a construction job being performed by said respondents near Vallejo, California. Libelant agreed to furnish said services until the completion of the said construction job provided said respondents found that the said barge was suitable and capable of performing the contemplated services. Libelant agreed to furnish the services of said barge as aforesaid for the charge of $10.00 per hour of actual use for eight hours per day or less with [23] a minimum charge for four hours on any day the barge was steamed up, and to furnish and pay for an engineer or operator of the barge, a fireman, water, fuel, oil, and full hull insurance. Libelant agreed to keep said barge fully insured for the benefit of the parties. Libelant warranted that the barge was in good condition and ready to perform the contemplated services. Respondent Bundesen & Lauritzen, on their part, agreed to pay said hourly charge for said serv-

ices for each hour of actual services with the minimum charge as aforesaid. Respondent Bundesen & Lauritzen further agreed to pay the cost incurred by libelant in towing said barge from Oakland to the place of the said construction work and in towing her back to Oakland upon the completion of the services.

II.

That under and pursuant to said agreement for the services of said barge, the operation, possession, maintenance, care and control of said barge was and remained in the hands of libelant; that if and insofar as any damage was due to or caused by any fault or neglect on the part of any member of the crew of said barge, libelan*d,* not respondents, was and is responsible for any and all such alleged fault or neglect.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Second, Separate and Affirmative Defense thereto, said respondents alleged:

I.

Said respondents refer to the allegations set forth in paragraph I of the First Affirmative Defense herein, and hereby expressly incorporate said allegations as part of this Second Affirmative Defense as if here set forth in full. [24]

II.

That under and pursuant to said agreement, libelant agreed to furnish and pay for full hull insurance on said barge and to keep said barge fully insured for the benefit of libelant and said respondents. Respondents are informed and believe and therefore alledge that libelant did fully insure said barge and that said insurance against loss or damage by fire, among other perils, was in full force and effect on May 21, 1941, at the time said barge was damaged by fire.

III.

Respondents are informed and believe that libelant made claim under said insurance for any and all damage suffered by said barge, as the result of said fire and that, pursuant to such claim, libelant has received payment from the insurer for any and all loss or damage suffered by said barge during the times referred to in the amended libel herein.

IV.

That under and pursuant to said agreement between libelant and respondent Bundesen & Lauritzen, said respondents are entitled to the benefit of said payment received by libelant from the insurer of said barge and are by reason thereof relieved of any and all liability, if any there be, for loss or damage to said barge.

V.

That if and insofar as libelant has not been compensated by the insurer of said barge for damage

suffered by said barge by reason of fire, as aforesaid, such failure to secure full compensation from the insurer is due to libelant's failure to keep said barge fully insured in breach of its agreement as aforesaid with said respondents; that by reason of such breach of its agreement, [25] libelant is estopped to claim or recover any damages suffered by said barge as the result of said fire on May 21, 1941.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Third, Separate and Affirmative Defense Thereto, said respondents allege:

I.

Said respondents refer to the allegations set forth in Paragraph I of the First Affirmative Defense herein, and hereby expressly incorporate said allegations as part of this Third Affirmative defense as if here set forth in full.

II.

That under and pursuant to said agreement libelant warranted that said barge was seaworthy in all respects and fit for the intended service.

III.

That in breach of said warranty of seaworthiness in all respects said barge was in fact unseaworthy in hull and equipment. Respondents are informed and believe and therefore allege that the fire which occurred on said barge on May 21, 1941, was due to

and caused by the unseaworthiness of the equipment of said barge.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Fourth, Separate and Affirmative Defense thereto, said respondents alleged:

That the fire which damaged the "Foy No. 2" occurred on the 21st day of May, 1941; that the libel herein was filed on the 10th [26] day of July, 1942; that libelant's delay in bringing its alleged cause of action for damage to said barge by reason of said fire has deprived these respondents of material evidence; that libelant has been guilty of laches and unreasonable delay in bringing the above entitled action.

And further answering unto the allegations of said amended libel and unto each alleged cause of action therein, and by way of a Fifth, Separate and Affirmative Defense thereto, said respondents allege:

I.

Said respondents refer to the allegations set forth in paragraph I of the First Affirmative Defense herein and hereby expressly incorporate said allegations as part of this Fifth Affirmative Defense as if here set forth in full.

II.

That under and pursuant to said contract, libelant furnished to respondent Bundesen & Lauritzen the services of said barge on the 16th, 19th, and

20th days of May, 1941; that on the 21st day of May, 1941, said barge was damaged by fire and thereafter rendered no further service to said respondents.

III.

That subsequent to the 21st day of May, 1941, to-wit, on or about the 9th day of July, 1941, libelant rendered a bill to respondents for any and all items due from said respondents to libelant pursuant to said contract, and thereafter, to-wit, on or about the 11th day of July, 1941, libelant received and accepted from said respondents the sum of $238.88 in payment of said items; that in accepting said payment, libelant made no reservation of any [27] right or claim to make or present any additional claim or item against respondents for damage to said barge by fire or other cause; that by rendering said bill and accepting payment thereof, libelant has waived and released any claim or cause of action for damage to said barge by fire or other cause.

Wherefore, said respondents pray that the libel herein, as amended, may be dismissed with costs to respondents, and for such other and further relief as to this Honorable Court may seem just and proper in the premises.

DERBY, SHARP, QUINBY & TWEEDT
Proctors for Respondents
James R. Bundesen, Howard F. Lauritzen and Bundesen & Lauritzen [28]

State of California,
City and County of San Francisco—ss.

Howard F. Lauritzen, being first duly sworn, deposes and says:

That he is one of the respondents in the above entitled action and makes this verification on behalf of respondents James R. Bundesen, Howard F. Lauritzen, and Bundesen & Lauritzen; that he has read the foregoing Answer to Libel, as amended, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HOWARD F. LAURITZEN

Subscribed and sworn to before me this 3rd day of November, 1942.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 3, 1942. Walter B. Maling, Clerk. [29]

INTERROGATORIES PROPOUNDED TO LIBELANT AND REQUIRED TO BE ANSWERED UNDER OATH, AND LIBELANT'S ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENTS, ANSWERED BY ED M. FOY, SECRETARY-TREASURER OF THE STOCKTON SAND AND CRUSHED ROCK COMPANY, INC., A CORPORATION, LIBELANT

Interrogatory No. 1.

It is true, is it not, that the parties agreed that the charge for the services of the "Foy No. 2" to respondents was to be $10.00 per hour of actual use, with a minimum charge for four hours on any day the boiler was steamed up?

Answer.

No. Rental of $10.00 per hour for actual use of the Foy No. 2, with minimum of four hours on any day boiler is steamed up.

Interrogatory No. 2.

It is true, is it not, that the parties agreed that the charge of $10.00 per hour was to include an engineer or operator, a fireman, water, fuel, oil and hull insurance on the barge?

Answer.

No.

Interrogatory No. 3.

It is true, is it not, that libelant brought the "Foy No. 2" to the location of respondent's construction job on May 15, 1941?

Answer.

Yes. Our tug delivered the derrick barge to respondents, who agreed to pay, and did pay, for this towage.

Interrogatory No. 4.

On May 15, 1941, the crew of the "Foy No. 2" consisted of an engineer and a fireman in the employ of libelant, did it not? [30]

a. What is the name of said engineer?

b. What is the name of said fireman?

Answer.

No. Libelant had no crew on the Foy No. 2 at the time of the agreement, nor at the time of the fire.

Interrogatory No. 5.

Did libelant inform respondents on or about May 14, 1941, that libelant had to put the said engineer and fireman of the "Foy No. 2" on another job?

a. Did libelant thereupon request respondents to endeavor to secure another engineer and fireman for and on behalf of libelant?

Answer.

No. Libelant said it had no crew aboard and had not had any crew aboard her for some time before. Respondents stated they would furnish crew and did so.

a. No.

Interrogatory No. 6.

It is a fact, is it not, that pursuant to libelant's request respondents secured Engineer Williams and Fireman Westall for libelant?

Answer.

No.

Interrogatory No. 7.

It is a fact, is it not, that on May 16, 1941, libelant's regular engineer and fireman instructed Engineer Williams and Fireman Westall in the manner of operating the barge and its equipment?

Answer.

No; Ralph Foy, vice president of libelant, showed one of respondents' employees, it is believed the fireman Westall, how to start the fire. [31]

Interrogatory No. 8.

The hourly charge to respondents for the service of the "Foy No. 2" included the wages of Engineer Williams and Fireman Westall, did it not?

Answer.

No. As already stated, the agreement was for payment of $10.00 per hour for the barge and use of the fuel already aboard, and respondents expressly agreed to furnish the crew and charge their wages back by deducting from rental.

Interrogatory No. 9.

It is a fact, is it not, that libelant agreed to keep the "Foy No. 2" fully insured during the period of service to respondents?

Answer.

No.

Interrogatory No. 10.

It was agreed, was it not, that the cost of such insurance for the benefit of the parties was to be included in the hourly charge of $10.00 for the service of "Foy No. 2"?

Answer.

No.

Interrogatory No. 11.

Was the "Foy No. 2" fully insured at the time she was damaged by fire on May 21, 1941?

Answer.

As to usual risks, the Foy No. 2 was fully insured, viz., marine, fire, collision, stranding, etc. only to an agreed insured value of $12,000.00, being part of libelant's master policies of insurance in the total sum of $27,000.00 on the Foy No. 2 and two other of libelant's vessels. $12,000.00 was not full insurance of the value of the Foy No. 2. [32]

Interrogatory No. 12.

Please state with respect to the hull insurance in effect on the "Foy No. 2" at the time of the fire on May 21, 1941:

a. The name of the insurer?

b. The amount of insurance?

c. The value of the "Foy No. 2" declared in the policy?

Answer.

a and b. Home Insurance Company of New York insured $6,000.00; Providence Washington Insur-

ance Company insured $3,000.00; Atlas Assurance Company, Ltd. insured $3,000.00.

c. $12,000.00.

Interrogatory No. 13.

Did libelant receive any payment or loan from the hull insurer of the "Foy No. 2" by reason of the damage to the said barge as a result of the fire on May 21, 1941?

Answer.

Yes.

Interrogatory No. 14.

If interrogatory No. 13 is answered in the affirmative, please state:

a. The amount claimed by libelant from the hull insurer?

b. The amount received by libelant from the hull insurer?

Answer.

a. Full amounts insured on Foy No. 2 under each of the above three master policies.

b. Full amounts insured, excepting for $500.00 being the agreed value of the salvage, which libelant received from insurers by proportionate reductions.

Interrogatory No. 15.

Is this action being prosecuted for the benefit, in whole or in part, of the said hull insurer of the "Foy No. 2"? [33]

Answer.

Yes. To the extent of their payments, as above.

Interrogatory No. 16.

Please state with respect to the damage by fire to the "Foy No. 2" on May 21, 1941:

a. What part or parts of the hull were damaged?

b. What part or parts of the house and superstructure were damaged?

c. What equipment was damaged?

Answer.

a. Deck and supporting members burned through.

b. Operator's house completely destroyed. All superstructure over machinery, including mast and boom, destroyed.

c. Equipment damaged included boiler, engine, hoist, drums, swinging engine, gear, ropes, cable, tools, A frame, tanks, etc.

Interrogatory No. 17.

It is a fact, is it not, that after May 21, 1941, libelant billed respondents for the amount due to litigant from respondents pursuant to said contract?

Answer.

No. Libelant billed respondents for the use of the derrick Foy No. 2 and towing, expressely stating "this statement does not release your Company from further liability or settlement in connection with loss due to the fire".

Interrogatory No. 18.

It is true, is it not, that after May 21, 1941, libelant accepted payment of the amount due from respondents to libelant pursuant to said contract without reserving the right to claim any further sum to

be due as damages to the "Foy No. 2" by reason of the fire on May 21, 1941?

Answer.

No. [34]

(Verification of Ed. M. Foy, Secretary-Treasurer of the Stockton Sand and Crushed Rock Co., Inc.)

(Receipt of Service)

[Endorsed].: Filed Nov. 21, 1942. [35]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 22nd day of July, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

This case came on regularly this day for trial. Guard Darrah and Agler Ellis, Esqrs., were present on behalf of the Libelant. Lloyd Tweedt, Esq., was present on behalf of the Respondent. Mr. Darrah and Mr. Tweedt made opening statement to the Court. Ed. M. Foy, Thomas W. Smith, Henry Fosa

and Ralph Foy were each sworn and testified on behalf of the Libelant. Mr. Tweedt introduced in evidence and filed Respondent's Exhibits A, B, C and E. Mr. Tweedt also offered a certain exhibit which was marked Respondent's Exhibit D for identification. It is ordered that the further trial of this case be continued to July 23, 1943, at 10 A. M. [36]

[Title of District Court and Cause.]

DEPOSITION OF ADRIAN A. WESTALL,

taken on behalf of the Libelant, before M. A. Clark, Notary Public in and for the County of Los Angeles, State of California, on Saturday, the 12th day of June, 1943, beginning at 2:30 o'clock p. m., at 614 Pacific Avenue, San Pedro, California, pursuant to Stipulation hereto attached.

Appearances:

For the Libelant: Darrah & Ellis, by Guard Darrah, Esq., 311 E. Main Street, Stockton, California.

For the Respondents: Derby, Sharp, Quinby & Tweedt, by Lloyd M. Tweedt, Esq., 1000 Merchants Exchange, San Francisco, California. [37]

ADRIAN A. WESTALL,

being by me first duly sworn to testify the truth, the whole truth and nothing but the truth relative to the action named in the caption hereof, deposed and made answers as follows:

Direct Examination

By Mr. Darrah:

Q. Your name is Adrian Westall?

A. Correct.

Q. And you were the fireman on the Foy Derrick Barge Number 2, in May, 1941, when it burned?

A. Yes, sir.

Q. Who did you work for at that time *time?*

A. I worked for Bundensen and Lauritzen at that time.

Q. How long before the burning of the Foy Number 2 was it that you were first employed by Bundensen and Lauritzen?

A. It was around two weeks.

Q. Do you remember the date of the burning of the Foy Number 2?

A. It was May 14, 1941.

Q. May 14th, or was it May 21st?

A. May 21st is right. I made a note of that, and let me look to see, to be sure. May 16th.

Q. May 16th is when you went to work for Bundensen and Lauritzen? [38]

A. No, when I first went to work for Bundensen and Lauritzen was May 21st. No, wait a minute, I am mixed up.

(Deposition of Adrian A. Westall.)

Q. Well, there is no issue about the date of the burning of the barge anyway, as far as that goes.

A. I worked for them a couple of weeks there before. I don't seem to have the date here.

Mr. Darrah: You will agree as to the record of the burning, the date was May 21, 1941?

Mr. Tweedt: Yes.

The Witness: I have that record as to the burning of the barge, it was May 21, 1941.

Q. By Mr. Darrah: Now, who gave you your directions as to what to do when you came to work there?

A. Well, one of the employees of the Foy Barge gave me my directions and what to do. They instructed me how.

Q. I mean generally, who gave you your duties, who was your boss on the job?

A. I was working for Bundensen and Lauritzen. They were my bosses.

Q. Did they have a superintendent or anyone there who directed the work?

A. No, Bundensen and Lauritzen did not. I got my instructions from one of the Foy's workman.

Q. As to what?

A. As to how to fire the boiler. [39]

Q. Wasn't that Ralph Foy and his brother-in-law that showed you how to fire the boiler?

A. I believe one of them was Ralph Foy. I am not sure of that, but I am pretty sure he said his

(Deposition of Adrian A. Westall.)

name was Foy; the engineer, he was the one that was giving instructions.

Q. You just saw him on the one occasion?

A. Yes, sir.

Q. He only instructed you as to the firing of the boiler? A. Yes, sir, that's correct.

Q. I mean generally, as to the work you did, who gave you your instructions?

A. Well, my instructions were given to me by Foy and the man under him.

Q. Well, they did not stay on the job and tell you what to do, did they?

A. They told me how to take care of the boiler.

Q. Who told you how to operate the equipment? What was the equipment doing? The derrick barge?

A. I wasn't operating the equipment; I was just firing it.

Q. Who gave you instructions as to when to come and fire it, and when to quit? Instructions like that? A. Bundensen and Lauritzen.

Q. An individual? Some individual, was that?

A. Some individual? The man that they had in charge of [40] the job there, I forget what his name was. I still don't remember what his name was.

Q. Now, who paid you?

A. Bundensen and Lauritzen.

Q. Do you know whether you were carried under their Workman's Compensation Insurance?

A. No, I don't.

(Deposition of Adrian A. Westall.)

Q. Did they deduct for your Social Security, or whatever it was that is required to be deducted?

A. Yes, they deducted that.

Q. How long had you been on the barge, this derrick barge, when Ralph Foy and his brother-in-law showed you and told you how to fire it?

A. How long had I been on it?

Q. Yes.

A. The first thing I got on in the morning, I had probably been on there a few minutes before they started to give me instructions as to how to fire it.

Q. And as soon as they had given you those instructions they went away?

A. Yes, in probably fifteen minutes.

Q. And you understood that was all the instructions you were to get from them?

A. Yes.

Q. They were not constantly instructing you?

A. No, sir. [41]

Q. Then you ran it a few days, did you, before anything happened?

A. No, this particular barge, no.

Q. Do you remember how many days you had been operating it?

A. The barge that burnt I had not run it at all. They gave me my instructions about fifteen minutes in the morning, and I went to work on it that day. I worked on it then that day; fired the boiler; previous to the day that it was burnt up.

Q. You had fired it that previous day?

(Deposition of Adrian A. Westall.)

A. Yes.

Q. And had it worked that day?

A. Yes, sir, it worked perfectly.

Q. Now, tell us what happened on the 21st of May, 1941?

A. Well, on the 21st day of May, 1941, I went up to fire the boiler, and had gotten up a reasonable amount of speed; I had got the firing well under way, and was subjected to a call to the toilet, and I left for four or five minutes, and when I come back it was, well, I would call it, it must have been combustion fire that started the fire that burnt up the boiler.

Q. Well, now, first, what did you do when you went to start the fire?

A. I started the air in the pump that atomized the [42] fuel, which takes the place of the steam atomizer, and after I had gotten that going, then I stepped out.

Q. Now, did you throw a burning rag in there?

A. Yes, I throwed a burning rag in before I turned on the air valve. I threw a temporary rag in there to ignite it, and so I threw this burning rag into the boiler, and then turned on the air after I had the air pressure up, and then turned on my oil valve, and forced that onto this burning rag, would ignite the oil and start it burning. That's the way to commence to fire a boiler; after you have the oil and atomized there, that is, the air substitutes as the atomizer until you get your steam up.

(Deposition of Adrian A. Westall.)

Q. Also then you turned on the air, atomizing the fuel, and threw in the burning rag?

A. No, I threw in my burning rag first, and then turned on the oil and air atomizing the fuel.

Q. Approximately how long was the burning rag burning, with the air and fuel all applied to it, before you left to go to the toilet?

A. Well, that's hard to say. I couldn't judge as to minutes. There was a space of time in there.

Q. A few minutes?

A. A few minutes, several minutes.

Q. And what had your instructions been, how much steam were you to get up before you turned on the crude oil?

A. There were no instructions on that. [43]

Q. Well, what had been your experience as to the amount of pressure required?

A. My experience, in firing boilers, is enough to carry the atomizer; so your air is atomizing the oil. You have to get up a sufficient amount of steam for the pressure to atomize your oil. Some boilers will run ten pounds, and some boilers it will run fifty pounds before you can atomize it.

Q. How did this one run, do you recall?

A. Well, I didn't get a chance to find out.

Q. From your experience the day before when you fired it up, how much pressure had you gotten?

A. I think it was thirty pounds, if I remember correctly.

(Deposition of Adrian A. Westall.)

Q. And you did not have that much pressure up when you left to go to the toilet?

A. No, I did not.

Q. Then go ahead and tell us just what happened?

A. Well, after I had the air atomizing the fuel, and it looked like it was well taking care of itself, I stepped out at the stern end of the barge to go to the toilet, and on my way back I heard this explosion, and immediately I proceeded back to where it was, to see what had happened.

Q. And what did you find?

A. Well, I found that the deck in front of the fire box was on fire. And I immediately tried to extinguish the [44] fire, looking around for something to put it out with, and I didn't find it. I used a pair of overalls and jumper that I had myself, to try to beat it out with.

Q. You tried to beat it out with that?

A. Yes.

Q. And what was the result?

A. Well, I don't know what the result was.

Q. I mean, did it spread the fire or put it out?

A. Well, it didn't put it out. If it had put it out, it would not have burnt down. It was not sufficient to smother it out.

Q. And did the flames continue to spread?

A. The flames continued to spread.

Q. And which way from the fire box?

A. Towards the forward end of the barge.

(Deposition of Adrian A. Westall.)

Q. And did you notice the fire extinguisher there?

A. I never knew there was a fire extinguisher. The fire extinguishers were never pointed out to me. No one ever pointed them out to me.

Q. Did you see them there at any time?

A. No.

Q. Even after the fire?

A. After the fire I saw them.

Q. You saw them there then?

A. I saw them on the deck. When they were placed there I couldn't say. They were on the deck of the barge after the [45] fire was over with.

Q. You had not looked to see where they were before that? I mean before the firing up?

A. No, I had not.

Q. Well, then what happened?

A. Well, after the fire had gotten under way, why I couldn't—after it got beyond my control, I left the barge, and when the other workmen arrived I notified them, and they notified the Fire Department, I guess, and they proceeded to lay their fire equipment out and extinguish the fire.

Q. Now, the instructions that you referred to from Foy merely amounted to showing you where the cocks were, is that it, how to turn them on?

A. The instructions I received from Foy was the oil valve, the atomizer valve, how to start the air pump, how to stop the air pump after I had got

(Deposition of Adrian A. Westall.)

enough pressure from the air, and you then proceed with the steam in the boiler as the atomizer.

Q. He didn't give you any instructions as to how long you should stay in attendance before you turned on——

A. (Interrupting) No.

Q. I mean how long you should run the fuel oil before you turned on the crude oil? A. No.

Q. How many pounds pressure, your experience as a fire- [46] man taught you that. How long had you been firing?

A. I had been firing more or less off and on for several years. I couldn't state the amount of years, but several years I had been firing boilers.

Q. Ten or fifteen years?

A. Yes, that's correct, steam boilers that I was acquainted with.

Q. Now, how did this fire occur? Can you tell us?

A. Well, I would say this fire was a combustion, explosion, that's my opinion of it at the time.

Q. Could it have been too much fuel oil was turned on, and it ran down?

A. No, I don't believe so.

Q. In Foy's instructions to you, did he tell you to stay in attendance upon it until you had sufficient, just some general language as to what you were to do to get enough steam? A. No.

Q. Or what did he tell you?

A. He just showed me the valves.

Q. He showed you the location of the valves?

(Deposition of Adrian A. Westall.)

A. Yes.

Q. And, being an experienced fireman, it would have been an insult to tell you how long to stand and watch it?

A. No, I wouldn't say it was an insult. Those boilers work different, there is no two boilers fire alike. [47]

Q. No.

A. That's up to the fireman, he judges that himself, I should say.

Q. Foy didn't say it would be safe to leave it after a little fuel oil was started?

A. Oh, no. No, he never mentioned any time.

Q. Have you ever previously had any experience where the oil line would seem to stop momentarily, when you are generating the oil like this, and then come on again? A. On boilers, yes.

Q. Did you ever see it spontaneously ignite from the little flame?

A. Yes. A locomotive boiler often does that.

Q. It's not an uncommon experience then for a fireman to see that happen?

A. No. An air bubble forms in there, and maybe it stops the fuel a minute, and then it comes through and ignites that way, and then blew back.

Q. The oil will run out in the meantime, and spread, and then when it lights again you have a fire. Is that it? If you are there you turn it off?

A. Yes.

(Deposition of Adrian A. Westall.)

Q. How long did it take normally to fire up this type of boiler? A. About an hour.

Q. About an hour? [48] A. Yes.

Q. Did you notice the condition of the deck around the fire box?

A. I never took a great deal of notice to that. I noticed it was oily, like so many fire boxes are.

Q. Anything else?

A. No, just the certain amount of oil gathers there.

Q. Any dirt in it, or how would it be?

A. Well, there is naturally a little dirt that you track in and out.

Mr. Darrah: I have six photographs here, and will ask that they be marked for identification as Exhibits 1, 2, 3, 4, 5, and 6.

(The said photographs were marked by the Notary as Exhibits 1, 2, 3, 4, 5, and 6, and returned to counsel.)

Q. Have you seen those photographs? Examine them, please. Do those pictures depict the condition of the Foy Number 2 immediately after the fire?

A. Yes, sir.

Mr. Darrah: I will offer them in evidence as Libelant's Exhibits 1 to 6.

(The said exhibits, by agreement of counsel, were retained by counsel for the Libelant.)

Q. On previous occasions where this sort of thing happened, where you turned on the generating

(Deposition of Adrian A. Westall.)

oil, or whatever you used to generate a boiler that you use crude oil [49] with, where a line went off temporarily, what did you do? What was the best practice as far as what should be done in a situation like that?

A. Well, the best practice, if it didn't come on right away, would be to find out what it was plugged up with, where it was plugged up and what was causing it not to flow freely.

Q. Well, would you normally turn it off and start all over again, as far as the generating process is concerned?

A. Well, if the oil was not flowing, you couldn't start all over again.

Q. Supposing it was burning, and went out, and continued to flow?

A. Well, the oil won't continue to flow.

Q. Did you ever see it do that where it would go out and then continue to flow?

A. Yes, I have seen that. Well, there isn't anything to do unless you stop it altogether. If you stop it altogether, you have to look up where the stoppage is.

Q. If it went out and continued to flow, wouldn't it be a better practice to turn it off and start all over again?

A. Most times it will light itself. Other times you have to throw in a rag. That's your best practice, is to shut it off and proceed over again.

(Deposition of Adrian A. Westall.)

Q. And it's better practice not to leave it while it is generating? [50]

A. Yes, that's correct. Sometimes those things can't be avoided.

Q. You could have turned it off, couldn't you, before you left?

A. Well, I could have, I guess.

Mr. Tweedt: Object to that and move to strike it as argumentative.

A. (Continuing) If you have a certain time to get it fired up in, you have to use all of your time available.

Q. By Mr. Darrah: Well, as a matter of fact, along this line didn't you previously say that on an occasion on November 9, 1941, when Mr. Foy, Ralph Foy and myself and Mr. Ellis were present, that it was not good practice to go off and leave the fire alone? That you should have put out the fire when you decided to go to the toilet?

Mr. Tweedt: Object to that on the ground the Libelant is seeking to impeach its own witness, and no grounds shown for it.

A. Well, it's good practice, I guess. But sometimes you can't help it.

Q. By Mr. Darrah: Well, I was asking, didn't you tell us that on that occasion when we went down to the barge?

A. Yes, I remember telling you that.

Mr. Darrah: That is all, you may cross examine. [51]

(Deposition of Adrian A. Westall.)

Cross Examination

By Mr. Tweedt:

Q. You have fired boilers for about fifteen years, haven't you, Mr. Westall?

A. Yes, sir, approximately that.

Q. And you worked on this particular barge, starting on May 16th, that is the Friday before the fire? A. That's right.

Q. Now, where did you get the fuel oil with which to ignite the boiler to start getting up your steam? A. Where did I get it?

Q. Yes. What was the source of supply?

A. It was a five gallon tank, or ten gallon tank, I don't remember which, placed on the starboard side of the fire box.

Q. And the oil flowed by gravity from that point to the fire box?

A. By gravity from that to the fire box, yes.

Q. The barrel was elevated then, was it, above the floor?

A. Elevated above the floor, I would say about fifteen feet.

Q. And what kind of oil did you use?

A. Used fuel oil.

Q. Was it fuel oil, diesel oil or crude oil?

A. Diesel. [52]

Q. Was there diesel oil on the barge when you first went to work on it, in this barrel?

A. Yes, sir.

(Deposition of Adrian A. Westall.)

Q. And this barrel was open, was it?

A. Open top barrel, yes.

Q. This was, from its appearance, a very old barge, wasn't it?

A. Well, not being familiar with barges, that was more or less the second barge I had worked on, and I couldn't judge as to that.

Q. Did you notice a lot of rotten timbers in the barge? A. I never examined the barge.

Q. Back of the fire box there was space on the deck between the water tank, behind the fire box, of a few feet? A. Back of what?

Q. Back of the fire box? A. Yes.

Q. There was a space of a few feet?

A. Between the fire box and the water tank, yes.

Q. Now, the planking around the fire box was saturated with oil, wasn't it?

A. The planking, yes, it was covered with oil.

Q. And that deck was pretty well chewed up, wasn't it? A. Chewed up?

Q. Yes.

A. Well, not any more than any deck that is walked on [53] and seen service.

Q. There was no metal sheeting on the deck, behind the fire box, was there?

A. Directly in front of the fire box, there was a space of about that far (indicating) that was metal sheeting; I would say, if I remember correctly.

Mr. Darrah: Indicating approximately a foot wide, say, with your hands?

(Deposition of Adrian A. Westall.)

A. Well, I would say it was about that wide, and about so long (indicating). I couldn't say the definite number of feet; I would say a foot wide and approximately three feet long. I wouldn't commit myself on that though.

Q. By Mr. Tweedt: Have you a distinct recollection of that, Mr. Westall?

A. I believe I have a distinct recollection of that.

Q. As a matter of fact, isn't that the space where the fire was burning when you came back?

A. No, because this was directly under the boiler, and the fire was burning back quite a bit from that, where it had caught on fire.

Q. What I am talking about, right beneath the fire box, right on the deck there is no metal sheeting of any kind, was there?

A. No. Right beneath the fire box, on the deck, there was no metal sheeting of any kind.

Q. Now, did Mr. Foy, when he showed you how to operate [54] the fire box and the valves and so on, did he point out to you any fire extinguishers on the barge? A. No, sir.

Q. Did Mr. Foy show you how to operate the water pump? A. No.

Q. Now, at the time of the fire you tried to operate that pump, didn't you?

A. I did try to operate the pump.

Q. And it wouldn't operate?

A. It would not operate.

(Deposition of Adrian A. Westall.)

Q. That pump also had a hose connected to it, didn't it? A. Yes.

Q. And that hose wasn't long enough to reach the fire box?

A. The hose that was connected was not long enough, and it was full of holes, it couldn't be used to extinguish a fire after we did get it working. There was several places in that hose that had to be tied, as far as I remember.

Q. Now, on the morning that the fire occurred, you started the fire in the way Mr. Foy showed you?

A. I started the fire in the way Mr. Foy showed me.

Q. And you had the air compresser running?

A. Yes.

Q. And you had the diesel oil flowing into the fire box? A. Flowing into the fire box, yes.

[55]

Q. And didn't you observe that that ignited properly? A. Yes.

Q. And did you watch it for some time, to see that it was burning properly?

A. I operated it to see if it was working properly.

Q. At the time you went to go to the toilet, you were satisfied from the manner of operating that it was operating satisfactorily, weren't you?

A. Yes, sir.

Q. Now, at the time that you heard this explo-

(Deposition of Adrian A. Westall.)

sion that you referred to, you were on your way back from the toilet, weren't you? A. Yes.

Q. How far was the toilet from the fire box?

A. Well, I couldn't say just how far it was.

Q. Well, I don't mean exactly, but it's less than 30 feet, or 20 feet or so?

A. It's around 30 feet, I think, from the fire box.

Q. And when you heard the explosion, what did you do?

A. Well, I immediately went back to see what the trouble was. I went back to the fire box, to see what had happened.

Q. How long were you gone, Mr. Westall?

A. I was gone several minutes, anyhow. I don't know just how long it was.

Q. Now, from your experience, Mr. Westall, what is the best way to put out an oil fire? [56]

A. Well, from my experience the best way to put out an oil fire is by smothering it.

Q. Water has a tendency to spread an oil fire, hasn't it?

A. Well, on a gas or oil fire it has a tendency to spread it. Sand will smother it, or smother it with a rug would be the best way to put it out, I would say.

Q. Is that what you tried to do, smother out the fire?

A. That's what I tried to do, smother it out.

(Deposition of Adrian A. Westall.)

Q. The fire spread towards the tool section of the house, did it?

A. The fire extended towards the forward end of the barge.

Q. Now, that whole deck inside the house there was more or less oil saturated and covered, wasn't it?

A. Yes, that's what you call your fire room.

Q. Did the fire spread rapidly, Mr. Westall?

A. Yes, it spread quite rapidly.

Q. Now, you didn't leave the barge until you saw you couldn't do anything more with the fire?

A. I left the barge when I saw that my life was in danger.

Q. And how soon after that did the Fire Department get down there?

A. Well, it was quite a little while. I couldn't say just how long it was. [57]

Q. About half an hour?

A. Half an hour or an hour.

Q. Now, how could this barge be reached, Mr. Westall? A. How could it be reached?

Q. Yes, just where was it located?

A. Well, it could be reached I guess—well, maybe you would call it a plank; and it could be reached by a boat, a rowboat.

Q. The Fire Department could not get down there with heavy equipment, could they?

A. No, they couldn't get down there with heavy

(Deposition of Adrian A. Westall.)

equipment. I would say it was a good mile that they had to string their hose.

Q. Was it a rubber tube that ran from the diesel barrel to the fire box?

A. Well, I couldn't call it a rubber tube. It was a hose.

Q. Or hose, I mean? A. It was a hose.

Q. It was not a metal pipe, was it?

A. It was not a metal pipe, no.

Q. Now, if you had been standing right at this fire box, Mr. Westall, when it was in the condition you saw it as you came back from the toilet, was there anything you could have done that you did not do?

A. No, there was not a thing I could have done that [58] I didn't do. Well, there was one way, if I had known where the fire extinguishers were, I could have used them.

Q. The fire extinguishers were not in the fire room, were they?

A. Well, I never saw any in there. There were fire extinguishers in there after it had been burnt. They were pointed out to me, but my attention was never called to them before. Mr. Foy never called my attention to them.

Q. And Mr. Foy never examined the extinguishers in your presence to see if they were working properly? A. No.

Q. Now, Mr. Westall, it was suggested to you that it was good practice to stand by the fire box

(Deposition of Adrian A. Westall.)

at all times when you have a fire burning in there. Does a fireman ever remain standing right at the fire box all the time the fire is burning?

A. No. It is not the fireman's job to remain at the fire box at all times. He more or less has other jobs to do. A lot of jobs I have been on, you have had to take care of the engine, and see that it is oiled.

Q. When the fire is burning, and you have observed that it is burning satisfactorily, there is no reason for you to suspect that something is going to happen to the equipment, if it is in good condition?

A. No. If it is burning satisfactorily, you can leave it. Of course I have left fires for hours, and sometimes come [59] back, and they would still be burning satisfactorily. And then again I have left them for a few minutes, and they were not. Some*time* forms there, an air bubble or something defective in the air line, that you can't detect.

Q. Diesel oil is very much more volatile than crude oil, is it not? That is, it burns more readily, and it's more explosive, isn't it?

A. Yes, your diesel oil will burn more rapidly than your crude oil, and it's easier to ignite.

Q. Most boilers that you have fired, have been fired with crude oil, haven't they? A. Yes.

Q. Sometimes backfires are caused by water in the oil, aren't they?

A. That's right. Water can be in there.

(Deposition of Adrian A. Westall.)

Q. And sometimes there is sediment that gets into the line, isn't there? A. Yes.

Q. Are you familiar with the effect of diesel oil on rubber?

A. No, I am not. I couldn't say that I was.

Q. Was the fire spread out when you got back to the fire box, Mr. Westall? A. Yes.

Q. That is, it was not just in one spot?

A. No. [60]

Q. It had spread on to the sides of the boiler?

A. Yes.

Mr. Tweedt: I think that is all.

Redirect Examination

By Mr. Darrah:

Q. You spoke of the planks being soaked with oil; wasn't that more in the nature of like asphaltum that was on there? A. Yes.

Q. Kind of caked with sand and dirt?

A. Sand and dirt and oil.

Q. As a matter of fact, that stuff didn't burn as readily as the bare wood, isn't that true, from your observation of it?

A. This stuff that was soaked, that's directly back of your fire box, there, and it burned pretty rapidly.

Q. Now, where you threw the rag with the oil on it, you didn't throw it on the floor, did you?

A. No, I threw it in this box here (indicating).

Q. And was that lined with bricks, or something?

(Deposition of Adrian A. Westall.)

A. That's lined with bricks on the inside, the fire box.

Mr. Tweedt: When you are referring to the picture, it is not very clear for the record. The box that you are talking about is the fire box that is beneath there? [61]

A. Yes, sir, it's a room back under there, lined with brick. It's part of the boiler.

Q. By Mr. Darrah: Now, where were those fire extinguishers when you saw them, immediately after the fire?

A. They were on the deck of the barge, on the starboard side, if I remember.

Q. Were they near the boiler, or far from it, or where?

A. Oh, they were just laying out on the deck there, on the starboard side.

Q. Ten feet or twenty feet from the fire box, would you say, or can you give us an idea generally?

A. I would say about ten feet.

Q. Isn't it a fact that in your excitement you forgot about the fire extinguishers?

A. Well, I thought about fire extinguishers, but I didn't know where to look for them. They were pointed out to me, and I looked around and I didn't see them. Foy had never pointed those fire extinguishers out to me.

Q. Well, they were not concealed or anything, were they?

(Deposition of Adrian A. Westall.)

A. No, I don't imagine they were. They might have been put in there afterwards for all I know.

Q. What do you mean by that, do you think they were?

A. No, I don't think they were, because I know all equipment has them. I wouldn't say they were. I have never been on equipment that has not had fire extinguishers, and [62] one thing and another. They generally point it out and show you how to handle it.

Q. Now, calling your attention to a conversation —this is in the nature of cross examination, and the witness is an employee of the Respondent, according to our contention—on November 9, 1941, when you, Mr. Ellis and myself and Mr. Ralph Foy were present, do you remember saying that there was a fire extinguisher available, but you forgot about it, in the excitement?

A. No, I don't remember of saying that.

Q. And do you remember saying that it was really carelessness on your part not to stay with the fire during the generation period?

A. No. The fire extinguishers were never pointed out to me.

Q. Would you say you did not say that?

A. I say I did not say that.

Q. You remember the conversation, the place and parties present down on the barge, the conversation I am talking about, don't you?

A. I remember the time we went out to the

(Deposition of Adrian A. Westall.)

barge, but I don't remember making any statement like that.

Q. I mean you remember Mr. Ellis and myself and Mr. Foy being present; do you remember the situation of us being there together on the barge?

A. Yes, I remember the morning we went out there [63] together.

Q. And you didn't say either that you had learned that there was a pyrene fire extinguisher available, but forgot about it in the excitement, and you didn't say it was just carelessness on your part, did you?

A. Well, no fire extinguisher was ever pointed out to me.

Q. No. I am asking you did you say this?

A. No.

Q. You didn't say that?

A. No.

Q. Had you ever had the experience of turning off a stream of fuel such as was going into this fire box, and then turning it on again? A. Yes.

Q. And observing what happened?

A. Yes, I had that experience of turning oil off and on, where you get a combustion of explosion, where it ignites spontaneously. And sometimes it won't cause any damage, and other times, if it's gone too long, and backfires, it will set thing on fire; I have had that experience, yes.

Q. You observed this condition of the floor, re-

(Deposition of Adrian A. Westall.)

specting the oil, prior to the incident of the burning of the barge? A. Yes. [64]

Q. Now, you said you tried to do something with the water pump; what water pump was that?

A. That was the water pump——

Q. (Interrupting) A pump, hand pump, or motor pump?

A. No, it was a gas pump in the stern of the barge. I tried to get it started, to combat the fire with, and I couldn't get it going.

Q. Well, had you started it on previous occasions? A. No, I never had started it.

Q. Were you sure you knew just how to do it?

A. No, I wasn't sure I knew how to do it.

Q. What kind of motor was it?

A. Gas motor.

Q. You are generally familiar with gas motors, are you?

A. Well, I can start one if they will start. Of course I can't say that I can start a gas motor, they don't all start alike.

Q. Now, in your conversation with Foy, was anything said about how much pay you were to receive?

A. Yes, at that time it was according to the Union scale.

Q. No; I mean in your conversation with Foy himself, when he was there?

A. Oh, no. Not with Foy. No, I was sent out there by the Union.

Q. And you reported directly to Bundensen & Lauritzen? [65] Is that correct?

(Deposition of Adrian A. Westall.)

A. That's right.

Q. And the Union, or whoever told you to go out there, told you to report to them?

A. Told me to report to Bundensen & Lauritzen, that's who I was working for.

Q. As far as Foy was concerned, nothing was said about pay or what you were to do, as far as the general operation of the rig was concerned? That is, he didn't tell you whether to use it as a pile driver or what-not? That was somebody else's business?

A. That's correct. I was working for Bundensen & Lauritzen, and I worked there that night, and the next day Foy's man would be there, they said, to show me how to fire the rig. And they were there. They never told me what they were going to do, or what they were not going to do.

Q. Bundensen & Lauritzen determined that?

Mr. Tweedt: Objected to as the witness is not in a position to answer that.

Q. By Mr. Darrah: Who did determine what was to be done as far as the rig was concerned?

A. Well, it didn't make any difference what the rig did, it was not any of my business.

Q. Except as far as you observed?

A. As far as I observed I still don't know what they [66] were doing. They were putting in a coffer dam, if I remember right. That's what they said at that time, I didn't know what that was.

Q. Should there have been another man there to

(Deposition of Adrian A. Westall.)

assist you, so as to leave one to watch that when the other one had to leave?

A. No, I don't think the Union calls for that.

Q. I know, but I am just asking about good practice?

A. Well, I couldn't say whether that is right or not.

Q. It would have been better, in your opinion?

Mr. Tweedt: Better for what? It would be better for him if he had five assistants.

Q. By Mr. Darrah: Better practice?

A. If you are getting down to safety, yes. Of course, precaution can always be used; regardless of how careful you are. I have learned that in the Maritime service in the last few weeks.

Q. Well, who was the engineer on the job?

A. Oh, the engineer of the job, what do you mean, the engineer?

Q. Was there an engineer on the Foy Number 2 at the time? A. The operator?

Q. Yes, the operator?

A. Williams was his name. I forget what his first initial was. [67]

Q. Was he there when you fired up?

A. No. No, he didn't come to work until the crew was called. I believe at the time it was 6:00 o'clock, I forget just what hour was set that morning for them to report for work.

Q. On the previous morning had he not arrived until that time?

(Deposition of Adrian A. Westall.)

A. On the previous morning he took me up that morning. I was riding with him, and he furnished me transportation up there the previous morning.

Q. And was he present on the previous morning when you fired up? Was he on the boat?

A. Yes, he was on the barge.

Q. And did you leave—on the previous morning did you leave the burner at any time during the time you were firing it up? A. Oh, yes.

Q. I mean during the time you were generating it?

A. Oh, yes. The previous morning he took me around the engine, and showed me where to oil, and the cup greases, where to turn down, and how to take care of the engine in general.

Q. You are talking about Williams?

A. No, I am talking about Mr. Foy's employee.

Q. I am talking about Mr. Williams.

A. No, he had nothing to do. He was just the engineer. [68] He operated it. I took care of the oil and firing of the barge.

Q. Well now, during the time you generated enough pressure to make it run on crude oil, the day before, did you remain in attendance on the fuel oil while it was generating? A. No.

Q. Or did you go off and leave it?

A. Oh, no, I went on the forward end and took care of the bull wheel, and took care of the grease, greasing the bucket, and took care of oiling the engines and different places.

(Deposition of Adrian A. Westall.)

Q. Could you hear it from where you were, those places? A. No, I couldn't hear it.

Q. What did you do, just throw the oiled rag in on the previous occasion——

A. (Interrupting) No, that was after I got it running on crude oil. You were asking me after I got it on crude oil.

Q. No, no, I am asking you before that. I am asking you from the time you threw the burning rag in until you got it on fuel oil; while you were generating it, in other words, is that what you call getting fire up?

A. Do you mean while I was running on diesel oil?

Q. Yes. [69]

A. While I was getting it running on diesel oil, I took care of things around the engine room, real close to the engine.

Q. The minute you threw the rag in and turned it on diesel oil, it was running on diesel oil?

A. You have to throw your rag in, your burning rag in, and turn on the oil, and get it ignited.

Q. And then you went away? A. Yes, sir.

Q. The day before? A. Yes.

Q. But nothing happened the day before?

A. No.

Q. And after a while you came back and found quite a little steam on?

A. Yes, and then I cut my diesel out and turned on the crude oil and turned on the steamer.

(Deposition of Adrian A. Westall.)

Q. What did that take, 40 minutes?

A. Forty minutes to an hour. Half an hour to an hour. It all depends.

Q. Did you make any inquiries about anything of Foy that he refused to tell you, when you were there? A. No.

Q. Was he cooperative?

A. Very cooperative.

Q. He seemed to be inclined to tell you anything you [70] wanted to know about it?

A. Yes, he seemed to want to tell me what I wanted to know about it. He was only there about half an hour.

Q. When you went around to the toilet, there was a big water tank that sits on there about eight feet high, and pretty nearly across the whole deck, and is between you and the fire box at that time, is that correct? A. That's correct.

Mr. Darrah: That is all.

Recross Examination

By Mr. Tweedt:

Q. On the day that Mr. Foy showed you how to operate it, after you turned on the diesel, and the fire had started to burning, you didn't stand there and wait until you got up thirty pounds of steam, did you? A. No.

A. He took you around and showed you other things to do?

A. Yes, showed me how to oil and so on.

(Deposition of Adrian A. Westall.)

Q. Have you ever worked on a boiler where you had an assistant fireman?

A. No, I have never worked on one yet where I had an assistant fireman.

Q. And the Union rules don't require that?

A. No.

Q. These backfires you speak of, you are just as apt [71] to have those when you have the crude oil on as when you have the diesel? A. Yes, sir.

Q. The action of firing the diesel with air, is the same as firing the crude with the steam?

A. It is about the same.

Q. Only it is more expensive, using the diesel with air than using the crude with steam?

A. Yes, I would say it is more expensive.

Mr. Tweedt: That is all.

Redirect Examination

By Mr. Darrah:

Q. Of course you didn't inquire of anybody as to where the fire extinguishers were, there was nobody to inquire when the fire started, and before that you had never thought of it?

A. No, I had never thought of it, to inquire of anybody about that. Most boilers have a steam hose laid out for putting out fires. And I didn't notice any. I doubt if there was any.

Q. It would have been immaterial in this instance, because you didn't have steam up, at any rate, would it?

(Deposition of Adrian A. Westall.)

A. Yes, it would have been immaterial because I did not have enough steam.

Q. The same way, the water would have been immaterial because water would spread it? [72]

A. Well, according to my theory with oil fires, water will spread it. The way I put out an oil fire, if you haven't got an extinguisher, is sand and chemicals; that is our information, to put them out with chemicals, I think they call it CO_2.

Q. Now, backfire, when the crude oil is on, is not as dangerous as backfire with the diesel fuel, is it?

A. Yes, I would say it is just as dangerous.

Q. Well, crude oil doesn't burn quickly like diesel fuel, does it? It's harder to light, isn't it? Harder to ignite?

A. Well, crude oil is harder to ignite, but I don't know.

Q. Aren't you apt to have an explosion of your diesel fuel——

A. (Interrupting) Yes, diesel oil is more explosive than crude oil, so I guess from that it would be more dangerous.

Mr. Tweedt: That is all.

Mr. Darrah: Will you stipulate that the exhibits may be retained by myself, and presented at the time of trial?

Mr. Tweedt: So stipulated.

Mr. Darrah: And may it be stipulated that the original deposition may be mailed to Lieutenant

(Deposition of Adrian A. Westall.)

Henry Plattner, at Atwater Barracks, Avalon, Catalina Island, California, and that the witness may read over and sign the deposition [73] before said officer?

Mr. Tweedt: So stipulated.

(Signed) ADRIAN A. WESTALL
Witness

Read over, corrected (no corrections) and subscribed before me this 7th day of July, 1943.

(Signed) HENRY A. PLATTNER
Lieutenant J. G.
U. S. Maritime Service [74]

State of California,
County of Los Angeles—ss.

I, M. A. Clark, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that the above and foregoing deposition was taken before me at 614 Pacific Avenue, San Pedro, California, beginning at 2:30 o'clock P. M., on Saturday, June 12, 1943, pursuant to the stipulation hereto attached; that prior to the beginning of said deposition the said witness, Adrian A. Westall, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth relative to said action; that the said deposition was thereupon taken down in shorthand by me, and afterwards, under my personal direction and supervision, transcribed into typewriting; that it was stipulated between counsel that the same might be

read over, corrected and signed before the officer stated in the deposition.

I further certify that I am not related to or employed by any of the parties to said action, nor their attorneys, and am not in any way interested in the event of the same.

Witness my hand and seal this 9th day of July, 1943.

[Seal] M. A. CLARK

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul 23 1943. [75]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 3rd day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

CASE ORDERED SUBMITTED; ETC.

This cause came on regularly this day for hearing of issue*d.* After hearing Guard *Darrh,* Esq., Proctor for Libelant, and Lloyd Tweedt, Esq. Proctor

for Respondent, and it appearing that all briefs have been filed, it is ordered that this case stand submitted. [76]

[Title of District Court and Cause.]

Thursday, July 22, 1943

Counsel Appearing:

For Libelant: Darrah & Ellis, by Guard Darrah, Esq. and Agler Ellis, Esq.

For Respondents: Messrs. Derby, Sharp, Quinby & Tweedt, by James A. Quimby, Esq., and Lloyd M. Tweedt, Esq.

Mr. Darrah: May it please the Court, in this matter, this is a libel in personam for recovery of the loss of "Derrick Barge Foy No. 2," case No. 23686-R, brought by the Stockton Sand and Crushed Rock Company against Bundensen.

It is the contention of libelant that "Derrick Barge No. 2" was chartered to Bundensen and Lauritzen by an oral charter on May 15, 1941. A conversation occurred in which Mr. Lauritzen called up Mr. Foy, being a member of the firm of respondents, [77] and Mr. Foy being managing agent of libelant, and asked over the telephone if he was using his Foy "Derrick Barge No. 2," to which he answered, "No."

Mr. Lauritzen said, "I have use for it for a couple of weeks. What will you charge?

Mr. Foy said, "$80. I have no crew for it. You will have to furnish your own crew, and we will de-

duct that." Mr. Lauritzen said he did not have steady work for it. Mr. Foy says, "We won't charge you except when you use it. Where do you want it?"

"Just above Sears Point Bridge. How about towing it over?"

"We will tow it, but you will have to pay the towage over and back."

Mr. Lauritzen said, "Is she insured?"

Mr. Foy said, "We are fully covered."

That is the substance of the oral charter. The boat, pursuant to that, was towed over by the libelant and used on the 16th, the 19th, 20th, and burned on the 21st, by respondents. That is, it was used by respondents. The burning occurred while they had it. The crew were procured by the respondents, that is, for instance, Mr. Westall, the fireman, who is involved, was already working for the respondents, and was put on this job. He received general directions from respondents and was paid by respondents, and his social security was deducted and compensation was carried on him, and his services, as were those of the operator, were billed back again or deducted from the $80 a day on the final adjustment on the cost of the services of the barge when they were paid.

On the morning of the 21st day of May, 1941, Adrian Westall, this fireman, appeared on the boat for the purpose of getting up [78] steam in advance of the time the regular crew appeared for work. The custom was, or the practice of firing that particular barge was to start a little air compressor,

which got up a small amount of air pressure, and then turn on a Diesel oil fuel cock, which was atomized into the burner of the steam boiler, which was ignited by an oil-soaked burning rag. This Westall did, and according to his testimony it was four or five minutes after he had lighted the oil rag and thrown it in, in the process of generating steam; that after 20 or 40 pounds of steam were generated, the pumps were turned on for the crude oil, and steam used to atomize the crude oil, and the crude oil burner then really fired the boiler.

In this particular instance, during the period of generating the boiler, getting up steam, four or five minutes after he lighted it on this morning—I might add, too, this Diesel fuel was fed in by gravity from a little open tank inside the engine room nearby the boiler, 8 to 15 feet away—and on this instance, after only four or five minutes after lighting it, he went away to the toilet. He went out of the engine room and around a very large water boiler which lay crosswise of the derrick barge and astern from the engine room, to the living quarters on the more after part of the barge, and there he went to the toilet in a different building than the one he was working in or firing in. He was gone several minutes, and while away he heard a puff, and upon his return to the engine room he found the floor of the engine room afire. He used his jumper in an endeavor to put out the fire, unsuccessfully. He had not observed, according to his testimony, the location of the fire extinguishers, although they were

there, one on each of the doors leading out of the engine room, and did not use the fire extin- [79] guishers. We will show, too, that even though he was an employee of respondents, he admitted that it was better practice not to leave the fire while he was generating steam. We would like to call at this time——

The Court: I would like to hear from the other side, for the purpose of the record.

Mr. Tweedt: If your Honor please, the position of respondents in this case briefly is as follows: It is our position that this oral agreement between Captain Foy and Mr. Lauritzen, one of the respondents, created a time charter, not a demise charter, or, in other words, was an agreement for the use of the vessel, or for the vessel to do some work for Bundensen and Lauritzen, not an agreement for them to take over and operate the vessel. If that position is established it becomes immaterial whether that fire was caused by negligence or not, because libelant would then become responsible for the safety and maintenance of his vessel. It is also our position that the fire was not due to any neglect. The deposition of this fireman was taken by libelant, and in it he fully sets out what he did in starting the fire, and that he followed the instructions which had been given to him by the libelants.

I think it appears from his deposition that what he did was the proper way of starting the fire. It appears that there must have been some sort of

backfire from the boiler, some sort of explosion, which caused the fire and threw fire and oil out around the boiler, which spread very rapidly and was impossible to control.

This barge was on the tide lands flats, mud flats, of the Napa River, where respondents were building a sewer outfall for the United States Navy. [80]

The Vallejo Fire Department arrived, and the County Fire Department arrived, and had to lay hose for almost a mile in order to reach the barge, a very difficult position in which to fight the fire.

We have those two positions, in the first place that we are not responsible for any negligence, and, in the second place, that there was no negligence.

We come to a third defense, which is to the effect that libelants agreed to insure and keep the barge insured. Libelants did in fact insure the barge, and they did in fact collect the insurance. Under those circumstances we claim there is no liability on the part of respondents. It was insured for $12,000 and valued at $12,000.

The Court: The value alleged in the petition is forty, isn't it?

Mr. Tweedt: The value is alleged in the petition to be forty. In the insurance policy the barge was insured at and valued at $12,000.

The Court: Very well.

Mr. Tweedt: I think it will also appear, your Honor, that the fire, while no one knows exactly the cause, must have been due to some defect in the fuel or in the equipment. The fuel was furnished by the libelant, and, of course, the libelant, whether

it be a time charter or a demise charter, implied the seaworthiness of the barge for the work.

There is also an additional defense. It appears that shortly after the accident the libelant billed the respondents for the services of the barge, and on that bill they reserved the right to claim damages for the loss of the barge by fire. Respondents [81] thereupon wrote to libelants, setting out the contract which had been made, and pointing out that libelants had agreed to carry the insurance, and therefore that there was no liability in any event on the part of respondents. Libelants did not respond to that bill, other than to send a new bill in which they omitted that reservation, and the bill was paid. Very briefly, that is the position of the respondents.

The Court: Call your first witness.

Mr. Darrah: Captain Foy.

ED. M. FOY,

called as a witness on behalf of libelant; sworn.

Direct Examination

Mr. Darrah: Q. Captain Foy, you are one of the officers of the Stockton Sand and Crushed Rock Company?

A. At that time I was secretary and treasurer and general manager.

Q. That is, in May, 1941, in May, 1941?

A. Yes.

Q. And that was a corporation duly organized

(Testimony of Ed. M. Foy.)

and existing under the laws of the State of California? A. Yes.

Q. You knew Mr. Lauritzen, of Bundensen and Lauritzen, did you? A. Yes, sir.

Q. Did you have a conversation with him on or about the 14th or 15th of May, 1941, respecting the Foy "Derrick Barge No. 2"?

A. Our office was in the San Pablo Hotel, and he called me up one morning there and wanted to know if No. 2 derrick was in use, and I told him it was not.

Q. Go ahead and give us the conversation.

A. He said, I think, he would like to use it for a couple of weeks. He said, "What will you charge me?" I says, "$80 a day, but I haven't got a crew." He says, "I can furnish a crew." "Well," I says, "if you [82] furnish a crew, I will charge you $80 a day and you pay the crew and charge it back to us," which he did, and as near as I can remember he asked me if it was insured. I says, "We are fully covered, oh, yes." He says, "Well, I may not use it steady." "Well," I says, "we won't charge it for the time you don't use it, but every time you fire up, you must pay for one-half day." That was about all the conversation. It was over the telephone.

Q. Was anything said about towing it over and back?

A. Oh, I asked him where he wanted it, and he told me just above the Sears Point Bridge, and I

(Testimony of Ed. M. Foy.)

says, "We will tow it over there and back, but you will have to pay for the towing," which he did.

Q. Was anything said about—or just what was said, if anything, about deducting——

A. How is that?

Q. ——anything said about deducting the cost of the crew from the $80 a day?

A. He said he would furnish a crew.

Q. Was anything said respecting the $80 a day, respecting that? A. 8 hours a day, yes.

Q. No, I say, $80 a day, was there to be a deduction from that for the cost of the crew?

A. Yes.

Q. Give us just what was said in that respect.

The Court: What was said about that?

A. Well, he was to furnish the crew, and I told him to pay the crew and charge it back to us.

Mr. Darrah: Q. And you would deduct that from the $80 a day?

A. Yes; and he did do that. I was not keeping books, but I think there was a separate check passed for the crew. I think he paid the bill of $80 and passed a check back for what he paid the men. We never carried them on our books at all, no compensation or employment or anything. [83]

Q. In other words, that was an adjustment of the rental? A. How is that?

Q. In other words, that was an adjustment of the rental? A. Yes.

(Testimony of Ed. M. Foy.)

Q. How long have you fired steam boilers, if you have?

A. Oh, 40 or 50 years. I am 82 years.

The Court: You, yourself?

A. Yes; I am 82 years old.

The Court: It is a long time since you fired any boiler, isn't it?

A. Not very long.

The Court: How long ago?

A. Oh, 10 or 12 years.

Mr. Darrah: Q. Was any survey made of this vessel prior to the issuance of the last policies on it? A. Not that I know of, no.

Q. Did you carry either Adrian Westall or an operator by the name of Williams on your payroll?

A. I just didn't hear that.

Q. Did you carry either Adrian Westall, a fireman, or an engineer by the name of Williams on your payroll? A. No.

Q. The Stockton Sand and Crushed Rock Company owned this "Foy No. 2 Derrick Barge"?

A. Yes, sir.

Mr. Darrah: That is all—oh, pardon me—one further question I didn't ask you.

Q. I will ask you, Mr. Foy, whether or not it is the exercise of due care for a man to leave a boiler during the period of time he is generating steam?

A. Very dangerous, if you are using oil of any description, and especially with a gravity feed.

Mr. Darrah: That is all. Pardon me, Mr. Tweedt.

(Testimony of Ed. M. Foy.)

Mr. Tweedt: Have you the original bill of May 21, Mr. Darrah?

Mr. Darrah: We haven't the original, but I have our carbon copy. [84]

Cross Examination

Mr. Tweedt: Q. Captain Foy, I will show you a copy of a bill——

The Witness: Please talk a little bit louder. I am a little bit deaf.

Mr. Tweedt: Q. Is that a copy of the bill sent to Bundensen and Lauritzen after the fire?

A. I am not sure I ever saw the bill. I did not keep the books, you know.

Mr. Darrah: We will stipulate that it is, if that will help.

The Witness (examining paper): That looks all right. I wouldn't say positive.

Mr. Tweedt: We will offer this bill in evidence as Respondent's Exhibit.

(The document was received in evidence and marked "Respondents' Exhibit A.")

(Testimony of Ed. M. Foy.)

RESPONDENTS' EXHIBIT A

May 21

Bundesen & Lauritzen,
Pittsbrug, California.

To use of derrick "Foy #2" and towing same to and from Vallejo.

May 15.	Towing barge "Foy #2" from Oakland to Vallejo and returning tug to Oakland.	
	10 hrs @ $5.00 (Oakland to Vallejo)	$ 50.00
	5 hrs @ $5.00 (Vallejo to Oakland)	25.00
May 16.	Rental on Derrick #2	80.00
May 19.	Rental on Derrick #2	80.00
May 20.	Rental on Derrick #2	80.00
		$315.00

Note:—Derrick destroyed by fire 5:00 A.M. May 21st. Additional charge will be made for towing hull to Greenbrae when released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire.

Your order: Mr. Lauritzen
Our order: 49-41

Mr. Tweedt: Q. Captain Foy, Bundensen and Lauritzen returned this bill to your office, did they not? A. Yes, I suppose so.

Q. And with it they sent a letter?

A. How is that?

Q. With it they sent a letter. Have you the letter of May 29?

A. I don't think I ever saw the letter.

Mr. Darrah: We will stipulate we received that letter.

(Testimony of Ed. M. Foy.)

Mr. Tweedt: We will offer as Respondents' Exhibit B this letter dated May 29, 1941.

(The document was received in evidence and marked "Respondents' Exhibit B.")

RESPONDENTS' EXHIBIT B

[Letterhead]

BUNDESEN & LAURITZEN
General Contractors

Industrial Row—Telephone 47

Pittsburg, Calif.,
May 29, 1941

Stockton Sand & Crushed Rock Co., Inc.
Hotel San Pablo
Oakland, California

Gentlemen:

We are returning your invoice dated May 21, 1941 in the amount of $315.00.

We refer to your note on the above invoice. Our agreement with Mr. Foy, Sr. was to the effect that they were to furnish the derrick barge at $10.00 per hour, which rental was to include the operator and fireman, water, fuel and oil, and insurance. It was further agreed that we were to pay for moving in and out of the derrick and also for the actual time the derrick barge was used, but at no time for less than 4 hours after the barge had been steamed up, in which case we would be responsible for the balance of the time (after the first 4 hours) of the

(Testimony of Ed. M. Foy.)

operator and the fireman, who have to be paid for a minimum of 8 hours per day.

As your company agreed to carry the insurance we cannot assume any liability in connection with the fire.

Yours truly,
BUNDESEN & LAURITZEN
WARNER FORSELL

CG
enc.

Mr. Tweedt: I would like to read that letter to your Honor at this time. I would also like to call your Honor's attention to this bill, the first exhibit. On it there is a note which states: "Derrick destroyed by fire 5:00 a. m. on May 21st. Additional charge will be made for towing hull to Greenbrae when [85] released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire."

Respondents' Exhibit B reads:

> "We are returning your invoice dated May 21, 1941 in the amount of $315.
>
> "We refer to your note on the above invoice. Our agreement with Mr. Foy, Senior, was to the effect that they were to furnish the derrick barge at $10 per hour, which rental was to include the operator and fireman, water, fuel

(Testimony of Ed. M. Foy.)

and oil, and insurance. It was further agreed that we were to pay for moving in and out of the derrick and also for the actual time the derrick barge was used, but at no time for less than four hours after the barge had been steamed up, in which case we would be responsible for the balance of the time (after the first four hours) of the operator and the fireman, who have to be paid for a minimum of 8 hours per day.

"As your company agreed to carry the insurance we cannot assume any liability in connection with the fire."

Q. Captain Foy, did the libelant, the Stockton Sand and Crushed Rock Company, make any reply to that letter?

A. I couldn't tell you. I didn't keep the book, and had nothing to do with the correspondence at that time. I don't know whether I had anything to do with it, or not. I will read it and see (examining document). I don't think I ever saw that. I am not positive.

Q. You know of no reply that was made to it?

A. No; I know of no reply.

Q. Are you familiar with that bill, Captain Foy? A. What is this [86] here?

Q. I am referring just to the typewriting.

A. That looks all right. I don't know that I ever saw it.

Q. Did you ever see this bill?

(Testimony of Ed. M. Foy.)

A. No; I never saw that. My impression is there was a check passed covering that. I know what the books show at the present time, but that I don't know——

Mr. Tweedt: Would you stipulate, Mr. Darrah, that this bill dated May 31, was sent to Bundensen and Lauritzen following receipt of that letter of May 29?

Mr. Darrah: Could I ask Ralph? I don't really know; this one, we received a copy of that. I can stipulate to that.

Mr. Tweedt: These two went together (indicating papers)?

Mr. Darrah: I don't know; I never saw that before, or even a copy of it. May I see that one (examining papers)? I am sorry. I don't know anything about that, not having seen it, but it looks as if it might have been sent out by some stenographer in the office.

Mr. Tweedt: I move to strike out that gratuitous remark by counsel.

The Court: Granted.

Mr. Tweedt: Q. Captain Foy, this is the regular form of bill head used by your corporation, is it not?

A. Yes.

Mr. Tweedt: I will ask that these two bills be marked for identification, if the Court please.

Mr. Darrah. If you will say you received that through the mail from us, I will stipulate. I don't know anything about it, is all.

Mr. Tweedt. I did not know there was any dispute about it.

(Testimony of Ed. M. Foy.)

Mr. Darrah. I don't think there is.

(These two bills referred to were marked Respondents' Exhibits [87] C and D For Identification.)

RESPONDENTS' EXHIBIT C

[Bill Head]

Oakland, Cal., May 31, 1941

M. Bundesen & Lauritzen,
Pittsburg, California.

In Account with
STOCKTON SAND & CRUSHED ROCK CO., INC.
River Sand . Crushed Rock . Towing
Clam Shell Digging and Unloading . Pile Driving

Hotel San Pablo

All Bills Due 10th of Month following Delivery

To use of derrick "Foy #2" and towing same to and from Vallejo.

May 15.	Towing barge "Foy #2" from Oakland to Vallejo and returning tug to Oakland	$ 75.00
May 16	Rental on Derrick "Foy #2" 8 hrs @ $10.00	80.00
May 19	Rental on Derrick "Foy #2" 8 hrs @ $10.00	80.00
May 20	Rental on Derrick "Foy #2" 8 hrs @ $10.00	80.00
		$315.00
		76.12*
		—*
		$238.88*

$375 less $76.12 as per attached bill.*
June 11th*

Your order: Mr. Lauritzen
Our order: 49-41

Note:—(*) indicates pencil writing on bottom of bill head.

(Testimony of Ed. M. Foy.)

RESPONDENTS' EXHIBIT D

[Bill Head]

BUNDESEN & LAURITZEN
General Contractors
Industrial Row—Telephone 47
P. O. Box 470
Pittsburg, Calif., May 31, 1941

Sold to Stockton Sand & Crushed Rock Co., Inc.
Hotel San Pablo — Your Order No.....
Oakland, California — Job No. 375

Terms: Net Cash

Interest Charged at 8% After 30 Days

All Agreements Contingent Upon Strikes, Fires or Other Interruptions Beyond Our Control

To services of engineer and fireman on the "Foy 2" at Vallejo to be deducted from rental of derrick as billed May 31, 1941 as per agreement.

May 16	Engineer	8 hours @ 1.60	$12.80
	Fireman	8 hours @ 1.10	8.80
May 19	Engineer	8 hours @ 1.60	12.80
	Fireman	8 hours @ 1.10	8.80
May 20	Engineer	8 hours @ 1.60	12.80
	Fireman	8 hours @ 1.10	8.80
			$64.80
Compensation 12.24, B. I. & P. D. 1,227, Old Age 1.00 and State & Fed. Unemployment Insurance 3.00%; Total 17.467% on above or...			11.32
			$76.12

Mr. Darrah. Q. Did you folks receive them through the mail?

Mr. Tweedt. Yes; the one bill from Stockton

(Testimony of Ed. M. Foy.)

Sand and Gravel was received through the mail. The other is a copy of one mailed by the respondents to libelant, of which I understand you have a copy in the files.

Mr. Darrah. Yes; that is correct. I have a copy of that.

Mr. Tweedt. Will you stipulate, Mr. Darrah, that this letter was sent to Bundensen and Lauritzen through the mail (indicating document)?

Mr. Darrah. What is the date of that?

Mr. Tweedt. July 8, 1941.

Mr. Darrah. Yes.

Mr. Tweedt. And that this bill dated May 31——

The Court: Identify it, for the purpose of the record.

Mr. Tweedt: Yes; this bill which is marked Respondents' Exhibit C For Identification, was enclosed with this letter.

Mr. Darrah: Was it? If you say it was, all right.

Mr. Tweedt: It was.

Mr. Darrah: Yes; I have no reason to doubt it.

Mr. Tweedt: We will offer in evidence, then, this bill for $315, marked Respondents' Exhibit C For Identification, and this letter from Stockton Sand and Crushed Rock Company to Bundensen and Lauritzen dated July 8, 1941, as Respondents' next exhibit.

(Testimony of Ed. M. Foy.)

RESPONDENTS' EXHIBIT E

[Letterhead]

STOCKTON SAND & CRUSHED ROCK CO., Inc.

River Sand . Crushed Rock . Towing
Clam Shell Digging & Unloading
Pile Driving
Hotel San Pablo
Telephone HOliday 5900
Oakland, California

July 8, 1941.

Bundesen & Lauritsen,
Pittsburg,
California.

Gentlemen:—

Attached is our statement covering work done for your company during the months of May 1941 at your Vallejo job.

Will you kindly forward check to cover at your early convenience, as these bills were payable June 10th.

In connection with the charge against this company for employee wages for derrick "Foy #2" will you let me have bill covering this charge at once in order that same may be passed for payment.

Under date of June 20th, I wrote you regarding line and anchors which were not returned when derrick "Foy #2" was removed from the Vallejo job. Will you kindly let me have an early answer

(Testimony of Ed. M. Foy.)

as to when I may expect return of this line and the anchors.

Yours very truly,
STOCKTON SAND & CRUSHED ROCK CO., Inc.,
By O. E. FOY,
Accountant

OEF:f
encl.

The Court: I suggest you read them in the record now.

Mr. Tweedt: I beg your pardon?

The Court: You have not read them in the record yet.

Mr. Tweedt: This bill, your Honor, dated May 31, to Bundensen and Lauritzen is identical in amount and items with the bill previously introduced as Exhibit A for $315, but it [88] does not——

The Court: There was an accompanying letter with it.

Mr. Tweedt: I will read that.

The Court: Very well.

Mr. Tweedt: But the bill of May 31st omitted the reference as to liability for damage to the barge. (Reading letter:)

> "Attached is our statement covering work done for your company during the months of May, 1941 at your Vallejo job.
>
> "Will you kindly forward check to cover at

(Testimony of Ed. M. Foy.)

your early convenience, as these bills were payable June 10th.

"In connection with the charge against this company for employee wages for derrick 'Foy No. 2', will you let me have bill covering this charge at once in order that same may be passed for payment.

"Under date of June 20th, I wrote you regarding line and anchors which were not returned when derrick 'Foy No. 2' was removed from the Vallejo job. Will you kindly let me have an early answer as to when I may expect the return of this line and the anchors."

In lieu of putting all these documents in evidence, your Honor, the parties will stipulate that the bill for $315, less the bill from the respondents for $76.12, covering wages of the fireman and operator, were paid by the respondents to the libelant.

The Court: The record will so show.

Mr. Tweedt: Q. Captain Foy, this letter which is Respondents' Exhibit B, which you have just read, that sets forth correctly, does it not, the substance of your agreement with Mr. Lauritzen?

A. How is that?

Q. I say, that letter sets forth the substance of your conversa- [89] tion with Mr. Lauritzen about May 14 correctly, does it not?

A. (Referring to letter) The water, fuel—yes, we furnished it, water and fuel—yes, that is correct.

The Court: Read it again so he can follow it.

(Testimony of Ed. M. Foy.)

(Mr. Tweedt thereupon commenced re-reading the letter referred to.)

Mr. Darrah: Pardon me, Mr. Tweedt. Could I ask you to read it just a little louder? Mr. Foy can't hear it in that tone of voice.

The Witness: You see, I am so deaf I can't hear your conversation.

Mr. Tweedt: You tell me if I am not loud enough.

The Witness: Yes.

(Mr. Tweedt thereupon re-read the letter referred to.)

The Witness: The question was asked as regards to our insurance, and I said that we were fully covered, but we can't cover—it is impossible for us to cover—under an insurance policy, a third party without we consent the insurance company and put a rider on the policy.

Mr. Tweedt: Q. You told Mr. Lauritzen that?

A. No; nothing said about it at all. I just said, "We are fully covered."

Mr. Tweedt: That it is a conclusion of law and I move to strike it out.

The Court: Very well.

The Witness: We are fully covered, but we can't cover a third party without getting the endorsement of the insurance company.

Mr. Darrah: I didn't get your Honor's ruling on this. Of course, it was a conclusion that Mr. Tweedt asked Mr. Foy [90] for.

The Court: Read it, Mr. Reporter.

(The reporter read the record as requested.)

(Testimony of Ed. M. Foy.)

Mr. Darrah: Was there an objection to that? The gist of the whole conversation, if this letter represented the conversation chartering the boat, that called for a conclusion. This is a conclusion.

Mr. Tweedt: Mr. Foy gave us his conclusion as to insurance. He did not state that conclusion to Mr. Lauritzen. I moved to strike his conclusion, not only on the ground that it is a conclusion, but as a matter of law it is not sound.

The Court: Read it again, Mr. Reporter.

(The reporter again read the record as requested.)

Mr. Darrah: As I understand, the captain now is qualifying his answer to the earlier question as to whether or not that contained everything in the agreement.

The Court: It may go out in its entirety, so there will be no question about it. Now develop the facts, whatever they may be.

Mr. Tweedt: Q. Captain Foy, you didn't tell Mr. Lauritzen that the insurance could not cover him without the consent of the company?

A. It was not mentioned about covering him, at all.

Q. What you told him was that "We are fully covered"?

A. I said we were fully covered. That was the total conversation in regard to that, I think.

Q. Mr. Foy, you stated that the barge was—that the charge for the barge was to be $80 a day?

A. Yes; that is what it was.

(Testimony of Ed. M. Foy.)

Q. It was really to be $10 per hour, was it not?

A. Yes; nothing less than half a day.

Q. But the basis of the charge was an hourly basis, was it not? [91]

Q. Captain, the bill that was sent making charges for the use of the barge at $10 per hour, that charge of $10 included the wages of the operator and fireman, did it not?

A. It included the wages, yes, because we was—he was to deduct it, what he paid for the men, from the bill, which I think he did. I think you have got bills to that effect.

Q. Captain Foy, did I understand you to say that you did not have a crew for the "Foy No. 2" when you talked to Mr. Lauritzen?

A. That is right. We did not have a crew for it.

Q. Will you explain why, then, the arrengement of $10 per hour was to include the wages of the crew? A. Because he said he would furnish the crew.

Q. What I mean is, why did your charge include the wages of the crew, if you did not have any crew?

A. I suppose he did not figure up just what he was going to pay the crew. We took his word for how many hours he used it. I don't know how many hours he used it. We took his word for how many hours he used it.

Q. I mean the rate of charge, that is, $10 per hour; if you had no crew why did such a rate include the wages of the crew?

(Testimony of Ed. M. Foy.)

A. We couldn't take out the wages, as I understand it, we couldn't take out the wages of the crew until we knew what it was. In fact, I never saw the crew until afterwards. I don't know who they was; didn't know who they was.

Q. The charge for the crew is a union fixed charge, is it not?

A. Out of the $10 an hour. What he paid the men I don't know. We took his word for what he paid the men.

Q. The charge for operator and fireman on the barge is a union fixed scale, is it not?

A. I think so.

Q. Captain, did you go up to the Bundensen and Lauritzen job at Vallejo when the "Foy 2" was taken up there? A. At what time? [92]

Q. The day the barge was taken up to the Vallejo job. A. No; no.

Q. Were you up there that evening after she had arrived?

A. No. The first time I was on the barge was after it burned up.

Q. You were not up there at any time she was working?

A. I went up after it was burned up, with the inspector and one of the insurance men.

Q. You were not up there at any time she was working? A. No.

Q. And you were not up there the night she arrived up at Vallejo? A. No, sir.

(Testimony of Ed. M. Foy.)

Q. Did you have any conversation with Mr. Lauritzen or Mr. Kitchen with respect to the crew of the barge at any time after she went up to the Vallejo job?

A. Mr. Lauritzen; I had a conversation with Mr. Lauritzen. Mr. Darrah and I met him on the road, I think, just above the bridge, Sears Point Bridge, and we was trying to locate the fireman. We wanted to talk to the fireman.

Q. This was after the fire?

A. This was after the fire, yes; not before.

Q. You did not have any conversation with him before the fire?

A. No; I never saw him after—all the conversation we had was over the telephone.

Q. The conversation you had with Mr. Lauritzen over the telephone about arranging for the use of the barge, I think you said that he called you at the Hotel San Pablo in Oakland.

A. Yes; that is where.

Q. As a matter of fact, Captain, didn't he call you at home in Stockton?

A. No; I don't think so. I don't know why he should, because I was down there practically all the time. He might have called my home before and found out I was not there, or something, but the bargain was all made over the telephone in [93] the San Pablo Hotel.

Q. Captain, in your conversation with Mr. Lauritzen about May 14th when you were talking about

(Testimony of Ed. M. Foy.)

the barge, was anything said in that conversation about responsibility for damage to the barge?

A. I just didn't quite understand that.

Q. When you had this conversation with Mr. Lauritzen about May 14th—— A. Yes.

Q. ——when he was talking about getting to use the barge—— A. Yes.

Q. ——was anything said about responsibility for damage to the barge?

A. Nothing spoke about it, at all.

Q. Did you say anything about the condition of the barge? A. No.

Q. Didn't you say at that time it was in good condition?

A. I don't think I did. The barge, itself, was not in good condition. The barge, itself, the hull, was a very—but the machinery was in excellent condition.

Q. The barge had been laid up for some time, hadn't it?

A. Not but a little. It had been laid up, oh, I would say not more than a week, that we had it down on the Estuary there unloading some stuff for the Government, I think it was, or for somebody.

Q. Were you aware, Captain, that three hours of rigging work had to be done on the barge on May 16th before she could be used?

A. I don't know that there was anything done on it; I don't know that there was anything wanted

(Testimony of Ed. M. Foy.)

to be done on it. I had just paid $800 for new flues in it a short time before.

Q. Were you told that the drums on the winches on the barge would not overhaul?

A. I had been on the barge a good many times. Of course, I never run the derrick. I have been on there [94] and fired it, but I never did start a fire. I never started a fire on it, but I have watched it after we got started, but as far as I know, everything was working all right, because I know the last time I saw it run down there at the foot of Fifth Avenue, it was lifting some very heavy stuff, very heavy, and the winches and everything worked O.K.

Q. The hull of the barge, Captain, was pretty well covered with dry rot, wasn't it?

A. There was some rot on the sides, and the deck was not in any too good condition. It was an old barge. The barge was 36 by 137, a very big rig, and it was subject to handling at least 10 or 12 tons.

Q. Before the barge was taken from Oakland to go up to Vallejo for this work, you put fuel oil aboard her?

A. It was full, I know. I don't know just when they filled it, but the crew had filled it. I don't know whether they filled it as they took it out, or before.

Q. And the Diesel oil?

A. Fuel oil; and our Diesel oil, never carried but just a barrel.

Q. Just the barrel that runs to the firebox?

(Testimony of Ed. M. Foy.)

A. Just for starting fires; that was all we used that for.

Q. Captain, the "Foy No. 2" was fully insured, was she not, on May 21st, the day of the fire?

A. It was covered for all kinds of losses. I have got three boats insured now that insured the same way.

Q. In any event, the insurance covered fire?

A. The insurance covered for all kinds of losses, but not for full value.

Q. In the policies is not the "Foy No. 2" insured for $12,000? A. Yes.

Q. And was it valued at $12,000?

A. Valued for $12,000, yes.

Q. After the fire you were paid the full amount of $12,000? [95] A. Yes.

Q. And so far as the $12,000 are concerned, you are prosecuting this action for the benefit of the insurance company?

A. Not entirely, no; I would have some interest in it, but the insurance company, of course, is the big beneficiary of getting their money back, but they —I have got to explain that I have got a barge right now, or a tug that was surveyed at $8138 value. They made me carry insurance on it for $12,000. The insurance company is boosting our insurance. They want more insurance. They valued replacement at $17,500 in the policy; it shows in the policy. We try to get off with as little insurance as we can and have it cover all the damage possible.

(Testimony of Ed. M. Foy.)

Mr. Darrah: You are reserving the issue of damages?

Mr. Tweedt: Yes.

Q. Captain, in your libel filed in this action, that is, the pleading filed in this action, it is alleged this conversation you had with Mr. Lauritzen was on or before May 5. Is that correct?

A. I don't remember the date. I couldn't swear to the date. I think some of the records there will show the day we took it up.

Q. The bills show it went up on May 15th, and the conversation was very shortly before that time, was it not?

A. Very shortly before that time, as I remember it, yes.

Q. Now, Bundensen and Lauritzen had also during May had your "Foy No. 1" barge at this Vallejo job, did they not?

A. I don't know whether they did or not. No. 1 is a very small rig, you know.

The Court: We will take a recess until 2:00 o'clock.

(A recess was thereupon taken until 2:00 o'clock p. m.) [96]

Afternoon Session, July 22, 1943, 2 P. M.

The Court: Proceed, gentlemen.

ED. M. FOY,

recalled:

Cross Examination
(resumed)

Mr. Tweedt: Q. Captain Foy, did you ever make a claim upon Bundensen and Lauritzen——

The Witness: I don't hear.

Mr. Tweedt: Don't you hear me?

The Witness: No; I don't. I am quite deaf, too bad.

Mr. Tweedt: Q. Did you ever make a claim upon Bundensen and Lauritzen for damages to the barge before you filed the libel in this action?

A. Not personally, I didn't, I don't think; I don't remember of it.

Q. Do you know of any claim made by the company? A. I don't know; I don't know.

Mr. Tweedt: That is all.

Redirect Examination

Mr. Darrah: Q. Captain Foy, you know that, acting as your attorney, I took the matter up with Bundensen and Lauritzen?

The Witness: You had better come a little closer, too. I don't hear you back there.

Mr. Darrah: Q. I say, you know that, acting as your attorney, I took the matter up with Bundensen and Lauritzen before filing the libel, as your attorney?

A. Oh, yes, yes; that is right; I do know of you. I knew what you was doing, but I—that is about all I knew about it.

(Testimony of Ed. M. Foy.)

Q. Now, Captain Foy, calling your attention to this letter, Respondents' Exhibit B, dated May 29, 1941, concerning which you [97] have testified——

The Witness: That is a letter from Bundensen and Lauritzen?

Q. Yes. Mr. Tweedt asked you the question if that substantially contained the terms of your verbal charter, verbal agreement. A. Yes.

Q. When you answered "Yes" to that, had you noticed that it had a reference to insurance in it?

A. There is no record here of any insurance. Let us see what it is, "Your company agrees to carry insurance"—"We cannot assume any liability." That was not mentioned. Positively the only question between Mr. Lauritzen and me was, "Have you got insurance?" and I said, "We are fully covered."

Q. What was that with reference to? What had you just been talking about before you stated that?

A. In regard to the towing, and, well, I suppose the use of the barge, but never was mentioned about covering them.

Q. You mean at the time you had the conversation over the phone where you made arrangements for leasing it to them; you mean nothing was said about covering them? A. No; nothing at all.

Mr. Tweedt: I object to that question, your Honor. It assumes something not in evidence. Whether or no the barge was leased is one of the issues in the case.

(Testimony of Ed. M. Foy.)

Mr. Darrah: That was solely for the purpose of calling his attention to the conversation.

Mr. Tweedt: It will be in the record if I don't object to it.

The Court: The objection will be sustained. Let it go out.

Mr. Darrah: Q. And in this letter by Mr. Lauritzen, the letter to you of the 29th, he said the $10 per hour was to include the operator and fireman, water, fuel and oil, and insurance. [98]

A. That was to cover everything, yes, as far as that is concerned.

Q. But the insurance was not to cover him, as far as your understanding went, was it?

A. It was not mentioned in that.

Q. Did you ever have any settlement of this case with Bundensen and Lauritzen? Did you ever settle this case with Bundensen and Lauritzen?

A. No, sir.

Q. Did you ever give a release of liability for the loss of the barge?

A. I have not seen Mr. Lauritzen since the day we met him up there at the boat.

Q. You were general manager of the corporation at this time, were you not, and subsequently for some time? A. Yes.

Q. For a year or more before you retired?

A. 27 years.

Q. Was it a year or more after this before you retired? A. Yes; until the 1st of April.

(Testimony of Ed. M. Foy.)

Q. What year? A. This year.

Q. This year?

A. Yes; I have been in active control until the 1st of April this year.

Mr. Darrah: That is all.

Recross Examination

Mr. Tweedt: Q. Captain Foy, you did, though, as I understand it, tell Mr. Lauritzen that the barge was fully insured?

A. I told him we was fully covered. That is as near as I can remember the words I used.

Q. You also told him you would keep the insurance in effect?

A. No, sir; I never mentioned it. All the conversation was, he asked if we had insurance, and I said, "We are fully covered." That is all the conversation there was in regard to insurance.

Mr. Tweedt: That is all.

Mr. Ellis: Lieutenant Commander Smith. [99]

THOMAS W. SMITH,

called as a witness on behalf of libelant; sworn.

The Clerk: Will you state your name?

A. Thomas W. Smith.

Mr. Ellis: If the Court please, we ask indulgence to put Commander Smith on a little bit out of order here. He tells me he has managed to get a few

(Testimony of Thomas W. Smith.)

minutes off, but is very anxious to get back to his work.

The Court: There is no objection to that.

Direct Examination

Mr. Ellis: Q. Your name is Thomas W. Smith?

A. Yes.

Q. You are a Lieutenant Commander in the Navy at the present time? A. Correct.

Q. Prior to your going into the Navy, you held, or do you still hold, license in the United States Steamboat Inspection Service? A. I do.

Q. You still hold that? A. Yes.

Q. Also unlimited chief engineer for ocean-going vessels, both steam and Diesel? A. Correct.

Q. You have been a marine surveyor for some time? A. I have.

Q. That is probably your work now, inspection of boats? A. I am in the Navy now.

Q. I mean in the Navy. I notice you are in the inspection and procurement department of the Navy; is that correct? A. That is right.

Q. Commander Smith, are you familiar with the —you know of the barge "Foy 2," do you not?

A. I do.

Q. Do you know what kind of a boiler it had?

A. It is a vertical Scotch boiler.

The Court: What?

The Witness: It is a vertical Scotch boiler. [100]

The Court: What does that mean?

The Witness: An upright fire tube boiler.

(Testimony of Thomas W. Smith.)

Mr. Ellis: Q. That boiler runs, ordinarily, on crude oil; is that correct?

A. It did; yes.

Q. Assuming that the method of starting a boiler was that Diesel oil was used to start, fed by gravity, fed from a barrel adjacent to the boiler; now, on the assumption that this Diesel oil was atomized by air, a little compressor run by a gas engine, and is fed into the boiler atomized by air pressure, assuming that a man would throw a burning rag into the firebox, turn on the Diesel oil from the tank, which flowed by gravity, and then assuming that it took approximately thirty minutes to an hour to generate enough steam to atomize the crude oil, and assuming he had just thrown the rag in there to start with the air and the Diesel oil, and had been going approximately two or three minutes, that the operator then left for perhaps three or four minutes, would you say that was using due care in the starting of that boiler?

A. Not with all those assumptions. He should stay close to the fire.

Q. He should stay close to the fire?

A. Yes.

Mr. Ellis: I think that is all.

Cross Examination

Mr. Tweedt: Q. You are familiar with this barge, "Foy No. 2"? A. I have seen it.

Q. Do you recall that the Diesel oil was contained in a barrel, an open barrel, on the port side

(Testimony of Thomas W. Smith.)

of the engine room, elevated some five feet or so off the floor, and that a rubber hose ran from the barrel down to the firebox?

A. I don't recall the construction, because I hadn't seen it for about five or six years.

Q. Assuming the construction was as I have stated, Lieutenant [101] Commander, that is a very makeshift arrangement for firing a boiler, isn't it?

A. Yes.

Q. Diesel oil has a very harmful effect upon rubber, has it not?

A. Yes; it is not good for it.

Q. And the fuel supply ordinarily runs to the boiler through a metal pipe, does it not?

A. Right.

Q. Now, Lieutenant Commander, in answering the hypothetical question that was given to you, if the fireman had watched the firebox long enough to be satisfied that it was operating properly, you wouldn't expect him to stand in front of the firebox and watch it from then on, would you?

A. He should be close by it.

Q. A fireman has many duties, has he not, on the barge? A. That is right.

Q. And those duties take him away from the firebox? A. Short distances, yes.

Q. If the fireman were 30 or 40 feet from the firebox, you wouldn't consider that an unsafe distance from the firebox, would you?

A. If he was within sight of it, where he could see it, it would be all right.

(Testimony of Thomas W. Smith.)

Q. Is there any greater risk, Lieutenant Commander, when the method of operation that was described to you by counsel's question—is there any greater risk while the Diesel oil is running with the air compressor than when crude is running with the steam?

A. There is a greater risk when the Diesel oil is on than when the crude oil is on.

Q. For what reason?

A. The crude oil has a higher flash point.

Q. Your answer is based entirely on the types of oil used? A. Yes.

Q. It is not customary to fire a boiler of this type with Diesel [102] oil, is it?

A. It is not a practice.

Q. This boiler was built to fire with wood?

A. Wood or coal or crude oil.

Q. It was a very old type of logging boiler, was it not? A. Yes.

Q. Had you seen this barge recently; that is, prior to May 21, 1941? A. No; I had not.

The Court: I believe your testimony was you saw it about five years before.

The Witness: About fire years, I saw it in the distance, your Honor, but I was not aboard it, or anything like that.

Mr. Tweedt: Q. What is the reason you think a man should stand next the firebox while the Diesel oil is running?

A. In the merchant marine, we always make

(Testimony of Thomas W. Smith.)

them stay close to the fires when they are lighting off.

Q. These men on the derrick barge are not merchant marine? A. I don't know.

Q. They are not subject to inspection by the United States Steamboat Inspection Service, are they?

A. I don't think they are, no.

Q. If an air bubble develops in the line, or anything that would stop the flow of the fuel, that might develop just as well with the crude on as with the Diesel on? A. Yes; I think it might.

Mr. Tweedt: That is all.

Redirect Examination

Mr. Ellis: Q. Commander, counsel suggested that you assume that the feed from the Diesel oil tank to the burner was a rubber hose. Now, I will ask you to assume that it was an iron pipe but connected at the place where the iron pipe goes into the Diesel oil tank with a short length of tubing or hose to prevent destruction by vibration. Would that be a normal method of [103] attaching that?

Mr. Tweedt: Where was the rubber hose that you refer to? The question is not clear to me.

Mr. Ellis: I am assuming it is up at the Diesel tank.

The Witness: It is not a proper method of connection; no.

Q. Would that be a proper method, assuming

(Testimony of Thomas W. Smith.)

that the jolts of the barge, and so forth, might shatter the connections?

A. No; it is customary to put a flexible tubing in.

Q. What would that be made of? A. Metal.

Q. Flexible metal tubing. Now, Commander, assuming a man, a fireman, had been working for fifteen years on steam boilers, in your opinion should it be necessary to tell him, in instructing as to the method of firing the boiler, should it be necessary to instruct him to remain close in attendance, as you term it, while lighting off, that is, firing up?

A. I think that would depend entirely on who the man was.

Q. Isn't it a sort of elementary principle among firemen that you should be in attendance on a boiler when you are firing up, or lighting off, as you say?

A. They usually always watch it.

Q. Counsel suggested that perhaps during the time the boiler was going the man went other places about the barge. During this particular period, in your opinion, would it be good practice, assuming that the engine room was enclosed, with solid doors on it, would it be good practice to leave that engine room during the time it was generating, so that you couldn't see the firebox or anything going on in there?

A. He should be in sight of it, as I say.

Mr. Ellis: He should be in sight of the firebox. That is all.

Mr. Darrah: We will call Henry Foss.

(Testimony of Thomas W. Smith.)

This witness, too, is called out of order, inasmuch as perhaps [104] his testimony should follow the deposition, but he is anxious to get to his work.

HENRY FOSS,

called as a witness on behalf of the libelant; sworn.

Direct Examination

Mr. Darrah: Q. Your name is Henry Foss?

A. Yes, sir.

Q. What is your occupation, Mr. Foss?

A. At the present time I am business representative for Local 3 of the Operating Engineers.

Q. And you are an operating engineer?

A. I have been paid as such for about 35 years.

Q. You have had experience firing steam boilers?

A. Yes.

Q. Have you ever fired one of the type described by the witnesses here as an upright Scotch boiler?

A. 13 years on the last time I was on the same type of boiler.

The Court: Why do they call it a Scotch boiler?

The Witness: I couldn't tell you why they give that particular definition. It was invented by a Scotch party. I can't recall where it came from. This particular type of boiler I refer to is a vertical tubular boiler with the name "Scotch."

Mr. Darrah: Q. Let us assume that Diesel fuel fed from a gravity tank and atomized by air pres-

(Testimony of Henry Foss.)

sure was lighted by an oil-soaked rag, and is used to get up steam to burn the crude oil in the boiler, and that crude oil is the regular fuel; that it takes 20 to 40 pounds pressure to properly burn the crude oil, and takes 30 minutes or more to get up the steam pressure required to fire on crude oil; let us assume, too, that the boiler is located in an engine room which is approximately 24 by 30, amidships of the barge, and that immediately behind the engine room is a large water tank that goes almost completely [105] across the barge, and that the living quarters are astern from the water tank; in other words, the water tank is between the living quarters and the engine room, and that there is a toilet in the living quarters; that the engine room is entirely enclosed; would a fireman *by* using ordinary care if, three or four minutes after starting the fire, and while it is still burning by this gravity feed Diesel fuel atomized by air from a gasoline-driven engine, if he left and went to the toilet without turning off the Diesel; would that be due care?

A. It would not.

Q. If a person acquainted with the equipment was instructing a new fireman, a fireman of say 15 years' experience, as to where the cocks were, how to utilize them and how to start this particular boiler, how to steam up, should it be necessary for him, the person instructing, to advise the fireman not to leave the vicinity of the boiler while he was steaming up?

(Testimony of Henry Foss.)

A. You say this fireman had had 15 years' experience?

Q. Yes.

A. Why, I should say no. That is his business, his trade. He knows perfectly well how to take care of those things without instruction from the engineer.

Q. Which is the most dangerous period during the firing up or getting up steam ready to use the crude oil, while running on Diesel fuel, is that a more dangerous period? Is fire more likely to occur then, or more likely to occur after it is steamed up and using crude oil?

A. I would say the accidents I have had have always been in the period of building up and getting up steam.

Q. Diesel fuel is more volatile and has a lower flash point than crude oil?

A. Well, it is more dangerous to handle.

Q. It lights easier? A. Yes.

Q. And floors more readily?

A. That is right. [106]

Q. Then of course, you have the hazard of the little gasoline-driven airpump, which wouldn't be as reliable as steam pressure from the boiler, and wouldn't be as steady, would it?

A. Well, that might be debatable.

Mr. Darrah: That is all.

(Testimony of Henry Foss.)

Cross Examination

Mr. Tweedt: Q. Mr. Foss, why should the fireman stand and watch the firebox while he is getting up steam?

A. I don't know as there would be any particular reason why he should particularly watch the firebox. He should remain in the vicinity of the boiler while the steam is being picked up.

Q. Why should he remain in that vicinity?

A. For many reasons. The boiler may drop a soft plug; the fire may go out for different reasons; there may be different foreign substances in the oils that would cause an explosion and the fire may go out entirely and pre-ignite and cause explosions in the fire room.

Q. The things you have just mentioned are just as apt to happen after the boiler has been fired up for hours? A. No.

Q. Why not?

A. It has never been my experience. I can't say it wouldn't happen. It has never been my experience to have any explosions take place, only from gas or something igniting after the fire had been shut down, causing gas to form and pre-ignnition, which don't take place after your boiler is up under working conditions; you have a steady flow of fire in there.

Q. You have a steady flow of fire and the heat is more intense than when you first fire up, and therefore generates more gas?

(Testimony of Henry Foss.)

A. Under certain conditions.

Q. If a fireman is 30 or 40 feet away, he is within a safe distance, isn't he?

A. If he is where he can see what is going on, he is. [107] If he is 30 or 40 feet away in another building, he is not.

Q. If the man is on deck and hears an explosion 30 or 40 feet away, and gets immediately to the boiler room, would you say he was in a proper position? A. It is a good place to get.

Q. All of the equipment on these derrick barges is entirely different, isn't it?

A. I don't think you will find any two of them similar.

Q. This particular boiler was an old logging boiler, designed to burn wood?

A. I think they are all more or less the same type, and you make changes in the box if you want to burn oil.

Q. There were only two of these, built by the Willamette Iron Works. Mr. Foss, have you ever seen this boiler?

A. An upright tubular boiler, aren't they, with so many feet of firebox space, all similar, with deviations of measurement only.

Q. What are the duties of a fireman?

A. Work under the direction and supervision of the engineer, and he takes care of his boilers.

Q. He oils the winches?

A. If that is his instruction; yes.

(Testimony of Henry Foss.)

Q. And the drums?

A. If so instructed by the engineer. Some engineers don't care for them to do it.

Q. You are familiar with what the engineer does in his daily tasks? A. I am.

Q. A great part of the time is spent away from the boiler, in fact, the majority of time is spent away from the boiler?

A. I wouldn't say so; it depends on the type of rig; with some rigs it would be impossible to spend but very little time out of the boiler room.

Q. After the steam is up there isn't anything to do, is there, at the firebox?

A. I wouldn't think he would operate very long if he was not there to keep fire in the box and keep water in [108] the tank.

Q. The oil flows steadily? A. Yes.

Q. There is a water line from the tank to the boiler? A. Usually an injector.

Q. There is a gauge? A. Yes.

Q. Every so often the fireman looks at the gauge? A. Right.

Q. There is nothing to do at the firebox outside of that?

A. Maintain the head of steam and keep a proper amount of water in that boiler.

Q. Under the rules of your union, the duties of the fireman are stated?

A. I didn't get that question.

(Testimony of Henry Foss.)

Q. You stated you were business representative of Local 3 of the Operating Engineers.

A. I am one of them.

Q. The union rules state the duties of a fireman, do they not?

A. The duties of a fireman are voted by the union, what he is supposed to do, right.

Q. Those duties include the oiling and greasing of all the equipment on the barge, do they not?

A. It says he shall work under the supervision and direction of the engineer.

Q. It is customary, too, isn't it, Mr. Foss, on these derrick barges where you have Scotch boilers, for the fireman to arrive ahead of everybody else and get up steam in the boiler?

A. It would depend on your instructions from your employer.

Q. In your experience, you don't bring a crew down to stand idle while steam is being got up?

A. The majority of times, yes. There is plenty for the engineer to be doing while the fireman is getting up steam.

Q. Why is the use of Diesel more dangerous than crude?

A. Well, on account of it is more fluid. It is more explosive than crude. Crude is more easy to handle. [109]

Q. Diesel is used for the purpose of getting up steam on very few boilers you are familiar with?

A. Mostly on account of cold weather and the

(Testimony of Henry Foss.)

like of that; crude gets very cold. Your object is to get something there you can handle without a great deal of trouble.

Q. And if the fuel oil stops flowing, whether it be crude or Diesel, you are apt to have an explosion or backfire, aren't you?

A. None whatever, unless it should come on again.

Q. Is there any difference between Diesel and crude in that respect?

A. I wouldn't think there would be. I have never found it so.

Q. You have had backfire on boilers, I presume?

A. Many of them.

Q. Operating on crude? A. Yes.

Mr. Tweedt: I think that is all.

Redirect Examination

Mr. Darrah: Q. When you had those backfires, were you in attendance on those fires?

A. I was.

Q. Was there any harm from them?

A. I had my eyebrows and hair pretty well burned off, and my face blistered up.

Q. Have you ever lost any equipment?

A. I never lost any equipment under my supervision.

Q. Is it the responsibility of the fireman to acquaint himself with the location of the fire-fighting apparatus? A. Certainly.

(Testimony of Henry Foss.)

Q. Isn't it a fact that normally the crude oil is pumped into your firebox, rather than fed by gravity?

A. In some cases, some installations are under pressure, some by gravity. They vary. It depends on the economical situation. It depends on the condition you are working under.

Q. One fed by steam pressure, a pump, that is, a steam pump from [110] the same boiler would be safer than if that was gravity feed, would it not, because if the steam went off, so would the fuel?

A. That would be debatable.

Mr. Darrah: That is all.

The Witness: May I be excused entirely?

Mr. Darrah: Is that all right, Mr. Tweedt?

Mr. Tweedt: Unless the Court wants him.

Mr. Darrah: O.K. I would like at this time to offer in evidence the deposition of Adrian Westall. Will it be stipulated, Mr. Tweedt, that this is the deposition of Adrian Westall, taken at a time when you and I were both in attendance, and may be received in evidence?

Mr. Tweedt: It was returned by the notary, I believe, wasn't it, to the Court?

Mr. Darrah: Yes. I haven't seen it, here, before now.

> "In the United States District Court in and for the Northern District of California, Southern Division. Stockton Sand and Crushed Rock Company, Inc., a corporation, Libelant, No.

(Testimony of Henry Foss.)

23686-R, v. John R. Bundensen, Howard F. Lauritzen, Bundensen and Lauritzen, and so forth, Respondents. Deposition of Adrian A. Westall, Taken on behalf of the Libelant, before M. A. Clark, Notary Public in and for the County of Los Angeles, State of California, on Saturday, the 12th day of June, 1943, at 614 Pacific Avenue, San Pedro, California, pursuant to stipulation hereto attached."

This deposition was taken by us of Adrian Westall, employee of the Respondents, as a hostile witness.

(Mr. Darrah then proceeded with the reading of the deposition up to a certain point, at which he interrupted the reading and made the following statement:)

Mr. Darrah: At this time we return the exhibits which Mr. [111] Tweedt was kind enough to stipulate that I withdraw for safe keeping until this time; and the exhibits are also offered in evidence with the deposition.

(Mr. Darrah thereupon proceeded further with the reading of the deposition and completed the reading of the direct examination contained therein.)

The Court: We will take a recess for a few minutes.

(Recess.)

(Testimony of Henry Foss.)

(Mr. Darrah thereupon completed the reading of the deposition.)

Mr. Darrah: Then follows the stipulation in the usual form. It will not be necessary to read that stipulation, Mr. Tweedt?

Mr. Tweedt: If your Honor please, in connection with this deposition Mr. Darrah made the statement that it was taken with Mr. Westall as a hostile witness. That statement was not made at the opening of the deposition. It is not contained in the stipulation and there is no basis to support it in the deposition. Mr. Westall, who is stationed on Catalina, and not available on subpoena, came over voluntarily, and I doubt very much if he could be called under the circumstances a hostile witness.

Mr. Darrah: He came to an office you arranged for.

Mr. Tweedt: I wouldn't expect you not to criticize me for procuring for you an office in which to take the deposition.

Mr. Darrah: I think the deposition speaks for itself.

RALPH LEDINGHAM FOY,

a witness called on behalf of libelant; sworn.

The Clerk: Q. State your name, please?

A. Ralph Ledingham—L-e-d-i-n-g-h-a-m—Foy.

Mr. Darrah: Q. You are an officer of the Stock-

(Testimony of Ralph Ledingham Foy.)

ton Sand and [112] Crushed Rock Company, a corporation? A. I am.

Q. And you were such officer the first part of May, 1941? A. I was.

Q. Ever since have been and now are?

A. Yes.

Q. And "Foy Barge No. 2" is owned by Stockton Sand and Crushed Rock Company, and was, say May 1, 1941? A. Yes.

Q. And at the time in question when the loss occurred, will you describe for us, if you will, the "Foy Derrick Barge No. 2," how long it was, and how wide?

A. It was around 137 feet long and 36 or 38 feet wide. I am not sure exactly now. It had a cabin on, and living quarters on the stern, and a cabin over the engine house, and a rig, derrick A frame and boom.

Q. Could you take a piece of chalk and draw a diagram on the blackboard as you describe it?

The Court: A diagram of what?

Mr. Darrah: A diagram of the barge.

The Court: Aside from the dimensions of it and the pictures here, could he improve on that?

Mr. Darrah: The pictures were taken after the fire.

The Court: Well, you have the dimensions of the barge.

Mr. Darrah: I thought maybe the location of the various things would be helpful.

(Testimony of Ralph Ledingham Foy.)

The Court: There is no dispute as to what there was on the barge and the location, is there?

Mr. Tweedt: Not so far as I know, your Honor, with the exception of the fire extinguishers.

Mr. Darrah: Q. Approximately what was the size of the engine room, about 24 by 30, was it?

A. Around that, 24 or 25 by 30, 32.

Q. What was the location of the engine room?

A. Just about [113] midship, little bit astern of midship.

Q. Was the longest dimension of the engine room crosswise or lengthwise? A. Lengthwise.

Q. What was in the engine room?

A. Boiler, large steam hoist, a swinging engine, air compressor, oil pumps, air tank, tools, and the stern end of the house, itself, was a large water tank that ran clear across the barge.

Q. How high was it above the deck?

A. Oh, it stood about nine feet, between eight and nine feet.

Q. How far from the edge of the deck did it come on each side? A. Around four feet.

Q. And then what was aft the water tank?

A. There was a space of *about feet* and then we had a steam double action winch, which took up about four or five feet. Then there was oil tanks; there was two oil tanks for the fuel oil, which set astern of that. The oil tanks was—one tank was around, oh, about 6 by 6, and the other tank was a long tank, about a 4-foot cylinder type tank, around 15 or 20 feet long.

(Testimony of Ralph Ledingham Foy.)

Q. And where was the toilet located?

A. Just aft of these oil tanks, there was living quarters and a kitchen. The house was located approximately amidship, right on the stern end of the barge; it had a double deck; in other words, it had a living room or dining room downstairs, and upstairs for a bedroom, and it was in the after part of this living room downstairs where the toilet was.

Q. Now, were there fire extinguishers, fire equipment, aboard the "Foy No. 2" at this time on May 15, 1941? A. Yes; there was.

Q. Was there a steam hose on it for fighting fire? A. Yes; there was a steam hose.

Q. A sandbox? A. A sandbox. [114]

Q. What kind of fire extinguishers were there?

A. One Pyrene on the cabin, and one Pyrene on the door looking from the stern to the bow, on the right-hand door, and one 2½-gallon tank straight opposite on the other door.

Q. The 2½-gallon tank was a soda and acid fire extinguisher? A. Yes.

Q. Will you tell us about this Diesel fuel tank? Where was it; how far from the boiler was the Diesel fuel tank you used to generate?

A. Well, from the front of the firebox it was, oh, approximately six or seven feet; not over eight.

Q. And how was it connected to the firebox?

A. There was around a 10-gallon drum; had a pipe connection out of the bottom of the drum, and a valve, and a piece of hose about two or maybe

(Testimony of Ralph Ledingham Foy.)

two and one-half feet long, then connected onto another piece of pipe that run back down into the burner in front of the firebox.

Q. What kind of a piece of hose was that?

A. A piece of steam hose.

Q. Was this all inside the engine room?

A. Everything, yes; the tank and the hose and the pipe.

Q. Did you see Adrian Westall, on or about May 14, 1941, down there on the barge?

A. I believe that was the date that I saw him.

Q. And to refresh your recollection, May 15 was the day you towed it over; was it the next day after?

A. Yes; the next day after we towed it over.

Q. Will you tell us just what conversation you had with Adrian Westall, what instruction or what-not you had with him respecting the barge at that time?

A. Well, on all boilers—a fireman knows how to fire a boiler, but it is a lot of help if there is somebody there that has been used to firing that boiler, to show him the different valves, so he don't have to hunt for them.

Q. You have fired the boilers on these different pieces of equip- [115] ment for a number of years?

A. Yes; I have.

Q. For how long? A. Since I was 16.

Q. And you have had a great deal of experience around boilers?

A. The first boilers I was on, I was about 16.

(Testimony of Ralph Ledingham Foy.)

Then we haven't had any boilers until around six or seven years ago.

Q. How old are you now? A. 38.

Q. All right, go ahead and tell us about your conversation with Westall.

A. I just showed him the different valves around, and the air compressor, just to help him out so he wouldn't have to try to locate 'em and make it easier for him.

Q. When did you get there that morning?

A. I stayed on the barge all night.

Q. And had you fired up before he got there that morning?

A. I started steam around four o'clock in the morning, and we had a full head of steam when he arrived.

Q. What time did he arrive?

A. Somewhere around 5:30 or 6:00 o'clock. I am not sure exactly. It was just after daylight.

Q. Did he identify himself when he came, or did somebody introduce you to him?

A. Well, I talked to the operator, that is, the engineer, and then I talked to—he told me the other fellow was firing, and I went down. He did not introduce himself, but he took charge of the boiler then. That is when I told him where the valves were.

Q. Did you tell anyone else of Bundensen and Lauritzen's men as to how the thing was operated at or about that time, the day before, or during the day?

(Testimony of Ralph Ledingham Foy.)

A. I wouldn't say for sure. It seems to me that there was a gentleman down there—I forget his name—was on the job when we pulled it in. I may have told him and I may not. I wouldn't swear to it.

Q. Was anything said to Westall about—did he ask any questions [116] about the manner of firing up that boiler?

A. Well, the only thing is that as soon as he found out where the valves was, he said, "I know how to take care of the rest of it." I think he was a competent man.

Q. Did you employ Westall? A. No.

Q. Or Williams? A. No.

Q. Was there anyone else in your organization besides yourself and your father who did employ people? A. No.

Q. Now, among other equipment, besides the things you have mentioned, was there not a bilge pump on the boat, on the barge?

A. Would you repeat that?

Q. Was there not a bilge pump; was there a bilge pump on the boat?

A. There was a gasoline engine, about a 1½-inch gasoline drive engine on the stern of the barge, used for pumping out the barge of accumulated water.

Q. Was that ever used for any other purpose than pumping the bilge?

A. When we was up the river in fresh water, we used to pump water with it into our tanks.

(Testimony of Ralph Ledingham Foy.)

Q. Was there any pretense of its being fire-fighting equipment? A. No.

Q. Were there buckets aboard? A. Yes.

Q. And lines? A. Plenty of lines.

Q. In your experience, is it more dangerous to leave a fire while you are generating steam than it is after the steam is up?

A. When you fire a boiler first your boiler is more liable to go out, because you haven't got the heat to help it along, and if—after your boiler is fired, why, as soon as your oil hits the hot box it is more liable to keep going. In other words, when you first start your fire your bricks are cold, and if you don't get a steady flow she is liable to drop out and not keep [117] going.

Q. Would a fireman using due caution leave the immediate vicinity of the boiler or firebox while he was generating steam to get started on?

A. No.

Q. Now, I would like you to be just a little bit more specific about the location of those fire extinguishers. Take, for instance, the soda and acid 2½-gallon fire extinguisher; will you describe just where it was located in the engine room?

A. In the engine room just above the steam oil pump.

Q. Where with reference to the doors?

A. Right alongside the door, just as you walked inside.

Q. Just inside the starboard or port door, or are they that way?

(Testimony of Ralph Ledingham Foy.)

A. Left is port, isn't it?

Q. Were the doors right and left, or were they front and back on that engine room?

A. On the side.

Q. On the right-hand side and on the left-hand side?

A. On the left-hand side looking forward on the barge was the soda and acid, and on the right-hand side was the Pyrene.

Q. As you went out, take first the left-hand side, was it on the right- or left-hand side of the door as you went out?

A. Standing in front of the firebox, looking forward on the barge, if you turned you would be on the left-hand side going out.

Q. Going out the left-hand door, it would be on the left-hand side of the door?

A. That is right.

Q. How about the one on the right-hand side?

A. Just the opposite.

Q. How do the doors swing, in or out?

A. Out.

Q. Do they swing on the side the fire extinguisher was on, or on the other side? Do you remember that?

A. The door was hung on the forward side, and the fire extinguishers were on the aft side of the door. [118]

Q. Was that true in each instance?

A. Was that what?

(Testimony of Ralph Ledingham Foy.)

Q. Was that true in each instance as to the fire extinguishers, both the right door and the left door?

A. Yes.

Q. Where was the steam hose?

A. We had the steam hose laying on the left-hand side of the engine, looking forward, just about seven or eight feet from the front of that firebox.

Q. Where was the sand box?

A. The sand box was right alongside the oil pump that pumped the oil for the fuel oil.

The Court: What do you use the steam hose for?

The Witness: Blowing out flues, cleaning your engine off.

Mr. Darrah: Q. Oh, what was Orville Foy's position in the Stockton Sand and Crushed Rock Company? A. Bookkeeper.

Q. Did he have authority to make contracts?

A. No.

Mr. Darrah: That is all.

The Court: Will you get through with this witness today?

Mr. Tweedt: I think it will take twenty minutes or half an hour, your Honor.

The Court: Well, we will take an adjournment until ten o'clock tomorrow morning. We wouldn't be able to get through with this case in any event this evening.

Mr. Tweedt: I don't think so, your Honor.

Mr. Darrah: This is our last witness.

Mr. Tweedt: This is their last witness, apparently, but we haven't started our case.

(Testimony of Ralph Ledingham Foy.)

(Thereupon an adjournment was taken until tomorrow, Friday, July 23, 1943, at 10:00 o'clock a. m.) [119]

Friday, July 23, 1943, 10:25 O'clock A. M.

RALPH LEDINGHAM FOY,

recalled.

Mr. Darrah: May it please the Court, although I announced that that was all at the end of the day yesterday, I have two or three more questions I would like to ask Mr. Foy.

The Court: Proceed.

Direct Examination
(resumed)

Mr. Darrah: Q. Mr. Foy, the method of firing this particular boiler was one that was used by other vessels, was it?

A. Yes; a number of vessels in the bay are fired that way.

Q. Is there anything inherently unsafe about that method? A. Nothing at all.

Q. What is the advantage of that method over using coal or wood, that has been referred to?

A. It is a quicker method, and a lot cleaner, and a lot less work for the men operating the rig.

Q. Do you remember a conversation had with Mr. Westall that has been referred to in his deposition, in 1941, in June, I believe it was, when Mr. Westall, yourself, Mr. Ellis and myself, went down

(Testimony of Ralph Ledingham Foy.)

aboard this barge shortly after the fire? Do you remember that occasion?

A. Yes; I remember the occasion, and at that time Mr. Westall admitted it was negligence on his part.

Q. Was it not a fact that at that time Mr. Westall stated that it was negligence on his part to leave the fire, that it was not good practice, and also that he did not—that in his excitement he forgot to use the fire extinguishers that were there?

A. That is right.

Mr. Tweedt: That is objected to on the ground it calls for hearsay and also calls for a conclusion of the witness. Apparently [120] he seeks to impeach their own witness. Certainly it is a compound question. If he answered, I wouldn't know.

The Court: Did you take his deposition?

Mr. Darrah: We took Mr. Westall's deposition, and in the deposition laid the foundation for this impeachment. On page 28—this is after referring to the time and place, he said he remembered the circumstances:

> "Q. And you didn't say either that you had learned that there was a Pyrene fire extinguisher available, but forgot about it in the excitement, and you didn't say it was just carelessness on your part, did you?
>
> A. Well, no fire extinguisher was ever pointed out to me.

(Testimony of Ralph Ledingham Foy.)

Q. No. I am asking you did you say this?

A. No.

Q. You didn't say that? A. No."

Mr. Darrah: We previously reminded him of the particular time and circumstances, which he said he remembered, but he denied the conversation.

The Court: This is to impeach that testimony?

Mr. Darrah: Yes.

The Court: I will limit it to that.

Mr. Tweedt: I also object to the question, if your Honor please, on the ground it is leading. I don't think I ever heard any more leading question.

Mr. Darrah: All right, I will withdraw the question and ask that the answer go out, and let the witness testify to the conversation.

The Court: Proceed.

Mr. Darrah: If that will meet counsel's objection.

Q. Then, Mr. Foy, will you give us the conversation to the best [121] of your recollection with respect to those two points with Mr. Westall on that occasion?

A. On this day, a short time after the barge had burned, Mr. Ellis, Mr. Darrah, and myself and Mr. Westall went over to the right, and walking over it and inspecting it, he admitted to us——

Q. Just what did he say?

The Court: State the conversation, who was present, state it in the exact words. That is calling for your conclusion.

(Testimony of Ralph Ledingham Foy.)

The Witness: He said it was negligence on his part to go away and leave the fire at that time.

Mr. Darrah: Q. What, if anything, did he say about the fire extinguishers?

A. He said that he did not use the fire extinguishers, but that he used a coat or overalls to try to extinguish the blaze.

Q. Is there anything more you recollect about that conversation respecting the fire extinguishers? Did he say why he didn't use them?

A. Not that I can recollect.

Q. Now, just what did you tell or show Westall respecting the greasing, turning down the grease cups, on the occasion on the 16th you have already testified to, 16th of May, 1941?

A. I don't know exactly how to answer that. Maybe—could I tell you how to do it?

Q. Well, all right, if that is the way you told him.

The Court: If that is what happened there.

Mr. Darrah: Q. Tell us just what you told him.

A. Well, I first showed him the valves and things, how to fix, get steam and operate the air compressor, and at that time, after your fire is going, it is not—it is just according to who is operating the rig and how many men they have on board, what the fireman's duties are. On this rig, when we are operating it [122] ourselves, we carry a fireman and an operator and a deck hand. The deck hand

(Testimony of Ralph Ledingham Foy.)

takes care of the outside oiling, and the fireman takes care of the fire room. In the fire room the fireman's duties are to grease his steam engine and his swinging engine.

Q. Is this what you told Mr. Westall on that occasion?

The Court: The testimony we are trying to develop is, what did you do when this man came on there, with relation to showing him *him* what to do, and what did you say to him?

The Witness: I told him, after telling him about the starting and firing, to grease up the pistons and the bearings in the engine room; and there are a few sheaves on the bull wheel just outside the engine room that have to be greased up, but all this can be done or should be done while in the engine room, while they are first steaming. After the oil is turned on and your gas engine is turned off, there is no noise inside the engine room except the burning of the fuel, and your outside operations for greasing are taken care of at that time.

Mr. Darrah: Q. That is, outside operations you speak of, the grease cups on the turntable or bull wheel. Are there openings in the engine house which permit a person to see in while he is greasing those?

A. There is a door on the left-hand side of the front of the house, and also the opening of about 6 by 4 width in the center of the front of the house, where the cables lead out from the drums of the winches, to go through the bull wheel and turntable

(Testimony of Ralph Ledingham Foy.)

for the running of the derrick, which are open, and you can see back into the engine room.

Q. Generally, is the engine room a little darker than the outside? A. Directly, at all times.

Q. Were the greasing operations that you called Mr. Westall's attention to in the engine room and on the turntable; is that [123] correct?

A. That is right.

Q. Now, as to those in the engine room, can he observe whether the fire is on or off at all times when he is in the engine room?

A. You are not more than ten or twelve feet away at any time.

Q. From your firebox? A. Right.

Q. And the others are in sight of the firebox; is that correct? A. Right.

Q. And even though you cannot be looking necessarily directly into the firebox from the rear of it, can you in the room tell whether the fire is burning, or not? A. There is always a glow.

Q. Always a glow from the fire against the engine room wall; is that what you mean?

A. That is right.

Q. Will you tell is just how far a person would have to walk from the firebox around to the toilet on there? A. Betweeen 50 and 55 feet.

Q. And will you describe the course where you would have to go?

A. Well, the barge is 38 feet wide or 36, I have forgotten what the testimony was—36, I guess it is.

(Testimony of Ralph Ledingham Foy.)

The boiler sits in the center of the derrick barge. You would have to walk within two feet of one side, either side he wanted to go.

Q. Why?

A. To get out the door and around the cabin and around the large water tank that is set just astern of the cabin.

Q. When you say cabin, you mean engine room?

A. Engine room, yes. That would be approximately 15 or 16 feet to the edge of the barge or the walkway of the barge, where he would walk by. He would turn half and go around 12 feet, 12 or 15 feet, which was the base of the large water tank. There was about a six-foot opening space through the barge. The anchor winch took up around 4 feet. The oil tanks took up another 6 feet. That would leave him at the stern of the barge, and turning right to go into the door, he [124] would have to proceed about 4 feet across, past midship of the barge, to get where the toilet was, and the toilet was an overhang off the stern of the barge.

Q. Now, what was the condition of the barge, as far as its machinery, equipment, hull, and so forth was concerned, at the time you saw it on the 16th of May, 1941?

A. The machinery, the boiler, all operating parts of the barge was in first class shape.

Q. Would you say she was seaworthy throughout?

A. It was passed by the Board of Underwriters for insurance just a short time before that.

(Testimony of Ralph Ledingham Foy.)

Mr. Tweedt: If your Honor please, we move to strike that out. It is not responsive to the question, and is incompetent, irrelevant, and immaterial. What an underwriter insures is certainly his business. Whether it is seaworthy or unseaworthy has nothing to do with it.

Mr. Darrah: Q. Just answer "Yes" or "No," Mr. Foy. I will withdraw it. A. Yes.

Q. How long prior to the fire had the boilers been inspected or tested, inspected and tested?

A. They were tested within a year.

Q. Within a year prior to the fire?

A. We re-tubed the boilers.

Q. How was the "Foy No. 1" fired?

A. "Foy No. 1" was not fired. It was Diesel driven.

Q. There was some testimony that Bundensen and Lauritzen had employed the "Foy No. 1" just prior to this time. Was your crew aboard at that time? A. That is right.

Q. That was a bill for services; is that correct?

A. Yes.

Mr. Darrah: I think that is all—just one further point; pardon me, Mr. Tweedt.

Q. Were there turn-off valves between the fuel oil tanks and the burners?

A. There was turn-off valves at the base of the [125] 10-gallon tank that contained the Diesel oil, and also another shut-off just at the front of the boilers.

(Testimony of Ralph Ledingham Foy.)

Cross Examination

Mr. Tweedt: Q. Mr. Foy, did you go up to Vallejo from Oakland on the "Foy No. 2" on May 15? A. No, I did not.

Q. Who was on the barge when she was taken up?

A. My brother went up with the towboat crew.

Q. When did you arrive on the barge?

A. I arrived the evening before the boiler was first fired up for the Bundensen and Lauritzen job.

Q. In the evening, about what time?

A. It was around four o'clock or something, I don't know; it might be a little later than that. It was still daylight.

Q. Was your father with you? A. No, sir.

Q. Did he come up later? A. No.

Q. He was not up there that evening at all?

A. Not to my recollection at all.

Q. Did you talk to Mr. Kitchen when the barge arrived at the Bundensen and Lauritzen job?

A. I did.

The Court: Who is the fireman? What is his name?

Mr. Tweedt: Westall was the fireman.

The Court: Who was Kitchen?

Mr. Tweedt: Mr. Kitchen is the superintendent for Bundensen and Lauritzen on the job.

The Witness: Mr. Kitchen is the gentleman sitting back there (indicating).

(Testimony of Ralph Ledingham Foy.)

Mr. Tweedt: Q. That is the gentleman sitting in the courtroom here, that you talked to?

A. That is it.

Q. Who else was present when you had the conversation with Mr. Kitchen?

A. My brother-in-law, Mr. Veach, who is in the armed [126] service now. I don't recollect anybody in particular except the crew on the tug and my brother.

Q. Mr. Veach was your regular fireman, was he?

A. He was the regular fireman on the barge when we was firing it, and also my helper on another derrick barge.

Q. Please state for us the conversation you had with Mr. Kitchen at that time.

A. Well, I don't recollect any——

The Court: Well, did you say "Hello" to him?

A. Sure.

The Court: All right, start from there.

Mr. Tweedt: Q. Did you have a discussion about the crew of the "Foy No. 2"?

A. No. Mr. Kitchen was there at the job when I arrived, if I am correct, and we pulled in with the derrick barge and——

The Court: There was nothing said up to this time? What was the first thing you recall that was said, if anything? Didn't you even greet each other or anything?

The Witness: Well, we said "Hello."

(Testimony of Ralph Ledingham Foy.)

The Court: All right, from there on.

The Witness: And I stayed with the rig and helped Mr. Kitchen there to run lines, this being on a mud flat, to run lines to get the barge into the dock.

The Court: But he wants the conversation. He wants to know what was said and done at that time and place, and who was present.

The Witness: I cannot recollect anything that was exactly said.

The Court: As near as you can remember; you don't need to be so exact about it, but just the conversation.

The Witness: I told him that I would stay with the rig—is that what you want? [127]

The Court: No matter what he wants or not; you just tell us the conversation. Don't concern yourself about him or what he wants, at all.

The Witness: I told him I would stay and fire up the rig and show the new men coming on the job the particulars about the operation of the barge.

Mr. Tweedt: Q. Did you tell him you had to go on another job and couldn't stay there and operate "Foy No. 2" on the job for him?

A. That is right.

Q. Did you tell him they would have to get another crew?

A. We never expected to—yes; I told him we would not be able to furnish a crew.

Q. Did you tell him to get the crew for you?

(Testimony of Ralph Ledingham Foy.)

A. No; I did not tell him to get the crew for me.

Q. That you would pay the wages of the crew?

A. Not to my recollection.

Q. Did Mr. Veach stay with you on the barge over night? A. That is right.

Q. And he helped fire up?

A. That is right.

Q. The next morning there did he help show Westall and Williams the work on the barge?

A. I left Mr. Veach there to acquaint the men that were stepping onto a rig they had never operated before, to help them to acquaint themselves with the operation of the rig.

Q. When the "Foy No. 2" arrived up at this job, Mr. Veach was expected to stay on the barge and fire, wasn't he, while she was there?

A. Not to my recollection. I was working on another job, and I went down there in the night, and didn't get but about three or four hours sleep, and had to be back up on a job at Rio Vista about eight o'clock. [128]

Q. Did Mr. Kitchen object to you and Mr. Veach leaving the barge? A. Not to my recollection.

Q. Did he tell you it would be difficult to get a crew to put on that barge who were familiar with it?

A. Not to my recollection.

Q. Did you tell them that they had nothing to worry about in getting another crew, the barge was fully insured, and it was your risk?

A. No; I did not.

(Testimony of Ralph Ledingham Foy.)

Q. Now, after you had shown Mr. Westall how to operate the "Foy No. 2," you told Mr. Kitchen, did you, that you were satisfied Westall knew how to operate the barge?

A. I do not recall those exact words.

The Court: As near as you can remember, say what was said about it.

Mr. Tweedt: Q. Did you say anything?

A. No; not to my recollection, I did not.

Q. The "Foy No. 2" is a very old barge, or was a very old barge at that time, wasn't it, Mr. Foy?

A. I do not know the exact age of the barge. It is according to what care is taken of a barge, what you would call an old barge.

The Court: You don't know the life of this barge?

The Witness: The life of a barge will run——

The Court This barge.

The Witness: No; I don't know.

The Court Was it 20 years?

The Witness: It was older than that. It must have been between 20 and 30 years old. I wouldn't swear to anything on it as to the exact age of it.

Mr. Tweedt Q. She leaked very badly, did she not?

A. As barges leak, which most of them do, she did not leak as bad as lots of them do, and if any leaks were caused from the barge at [129] this time, which you were trying to claim, it was done by lay-

(Testimony of Ralph Ledingham Foy.)

ing on a mud flat on the operation of the Bundensen and Lauritzen job.

Q. You put her on the mud flat?

A. At the direction of Mr. Kitchen, the barge was pulled in.

Q. By the Foy tug? A. Right.

Q. You knew exactly the type of work that she would be required to do, and where she would be required to lay? A. Right.

Q. You had the "Foy No. 1" up there previously? A. Right.

Q. And you were familiar with the type of work? A. Right.

Q. I think you stated the "Foy No. 2" was 137 feet long.

A. To the best of my recollection, it is.

Q. How far would you say that it is from the firebox to the stern of the barge?

A. In a direct line?

Q. Yes.

The Court: About 30 feet.

The Witness: No; it was a little over that. It must have been around 40—the fire engine room door was astern amidships, approximately 45 or 40 feet.

Q. The firebox then is not located approximately admidship on the barge, is it? A. No.

Q. It is well aft?

A. Not well aft; aft of center.

Q. You were on the barge after the fire, were you not, Mr. Foy? A. Yes, sir.

Q. Will you look at these pictures and tell me

(Testimony of Ralph Ledingham Foy.)

if that is the way the vessel looked after the fire (handing pictures to witness)?

A. Yes; it looks like it.

Mr. Tweedt: If your Honor please, the pictures that are in evidence I would like to supplement with these, because they show the barge a little better, I believe, in its entire length. [130]

The Court: Very well.

Mr. Tweedt: I would like to offer these in evidence as Respondents' Exhibits next in order.

(The photographs were marked, respectively, Respondents' Exhibit F and G.")

Mr. Darrah: I understood they were all in evidence. Weren't they all in evidence?

Mr. Tweedt: These are different pictures, Mr. Darrah, than you have.

Mr. Darrah: Then may I see them? Is this before or after the fire?

Mr. Tweedt: If you can't tell from the barge, it must have been in pretty bad shape, Mr. Darrah.

Q. Mr. Foy, on these exhibits, Respondents' Exhibits F and G, this stack on Exhibit G that appears in the center of the picture, that is the boiler we have been talking about? A. That is right.

Q. And as we look at this picture the firebox is on the after side of that boiler?

A. That is right.

Q. And in Respondents' Exhibit F the house that appears on the aft end of the barge is it lies in that picture is the crew's quarters?

(Testimony of Ralph Ledingham Foy.)

A. That is right.

Q. And again the stack appearing in the center of the picture is the boiler?

A. That is right.

Q. And the distance from the boiler and the firebox to the crew's quarters was approximately, you say, 40 feet? A. To the stern of the barge.

Q. It is a little shorter than that to the entrance to the crew's quarters? A. That is right.

Q. Now, Mr. Foy, anyone on the stern of the barge could see the stack over the water tank, could he not? A. If he was outside the [131] cabin.

Q. Any place on the barge, you could see the stack of the boiler, could you not?

A. Not in front around the bull wheel.

Q. You could see it from the side of the front, from either corner of the barge?

A. Not unless you were standing toward the bow corner, either bow corner.

Q. But between the crew's quarters and the boiler stack there was no obstruction except the water tank?

A. That is right, if you are outside the house.

Q. Any experienced fireman can tell, can he not, from the smoke coming out of the stack, what is going on inside the firebox?

A. That is providing he is looking at it.

Q. Yes. This steam line that you spoke of on the barge, you regard that as being fire equipment?

A. No. It could be used as fire equipment if you had steam.

(Testimony of Ralph Ledingham Foy.)

Q. But you would have to have steam in order to use it? A. That is right.

Q. This barge had no pump available for fighting fire? A. No; there is not.

Q. The fire extinguishers that you referred to were in the fire room, were hanging on the forward side of the doors leading into the fireroom?

A. They were hanging on the after side of the door jamb.

Q. The after side of the door jamb?

A. The door swung this way (indicating) and the fire extinguishers were just inside, the wall on the inside of the cabin.

Q. The door swung to the stern?

A. To the bow.

Q. To the bow? A. Yes.

Q. And the extinguishers hung on the after side of the door? A. That is right. [132]

Q. You stated yesterday, Mr. Foy, that a boiler fire is more apt to go out when you are first heating up; that is correct? A. That is right.

Q. And by the same taken it is true, is it not, that there is less danger of any fire occurring if the fuel continues to flow after the fire has gone out, when you are first firing up?

A. Will you repeat that, please?

Q. Let us assume that the fire goes out when you are first steaming up. A. Yes.

Q. And thereafter the fuel starts to flow again.

A. Yes.

(Testimony of Ralph Ledingham Foy.)

Q. There is less danger of fire, of that fuel igniting under those circumstances than there would be if the firebox had been operating for an hour or two hours or three hours?

A. That is according to how long before the fire goes out. If the fire goes out before your bricks are hot, there is less chance for any of it, but if your fire has been running long enough to heat up your bricks and goes out, the oil will ignite itself.

Q. Then it is also true, if on this occasion the oil did stop flowing and it started to flow again and then ignited, the firebox must have been very hot?

A. Not very hot.

Q. It takes considerable heat, does it not, to ignite Diesel oil?

A. No, not to amount to anything, at all, not when you are smouldering on hot brick.

Q. How long does it take to get the bricks hot?

A. All right, we go into this now. The rig was in operation the day before——

Mr. Tweedt: I don't know.

The Witness: May I find out?

Mr. Tweedt: Isn't it a fact that the rig had been laid up a considerable time before you started to take her up to this [133] job?

A. Not a considerable time.

Q. It had been laid up, hadn't it?

A. It had been.

The Court: How long?

(Testimony of Ralph Ledingham Foy.)

The Witness: Oh, a matter of a couple of weeks is my best recollection. May I find if that boiler was steamed up the day before this accident happened?

Mr. Tweedt: I don't know where you can find out.

The Witness: Let us get the report of our work. This depends on whether these bricks were hot the day before, whether they had any heat in the boiler.

The Court: You will get us all warmed up, if you are not careful. We have a method of procedure in court, and you are put on the stand to find out what you know, not what somebody else knows. Proceed.

Mr. Tweedt: Q. How long did it take to heat up the bricks in the firebox?

A. If the boiler is cold and hadn't been in use the day before, it would take anywhere from an hour to an hour and a half, an hour and three-quarters, to get a full head of steam.

Q. I don't mean to get a full head of steam. I mean sufficiently hot enough in your opinion to ignite the fuel.

A. To the most—if the boiler has been fired up the day before, it would approximately take around twenty minutes.

Q. And if the fire had been burning for twenty minutes, Mr. Foy, you would think that the indication from the fact that it had been burning twenty minutes would be that it was operating satisfactorily, wouldn't you?

(Testimony of Ralph Ledingham Foy.)

A. Well, that all depends on whether the boiler was steamed up the day before, or not.

Q. Let us not go into that. We have answered the question on the basis that it was cold. [134]

The Court: You said it would take twenty minutes to heat it up.

The Witness: It would take twenty minutes to heat a full boiler up so that it would ignite its own fuel from the bricks, and a warm boiler maybe it would take five or ten minutes, not over that.

Mr. Tweedt: Q. Now, will you please answer the question that I asked you?

The Court: Read the question, Mr. Reporter.

(The reporter read the question.)

A. Yes.

Mr. Tweedt: Q. And you wouldn't, Mr. Foy, think that a fireman under those circumstances, who went out to the toilet, was negligent, would you?

A. As long as he was on Diesel oil, it is dangerous to leave the fire. He was negligent.

Q. You think it would be dangerous to leave for two minutes?

A. With Diesel oil, yes. May I explain why?

The Court: You may explain the answer if you wish.

The Witness: This engine is operated by an air compressor, and you have a gas engine operating the air, and your Diesel oil flows down from your tank. While that gas engine is running you can not hear the roar of the firebox. After the gas engine is

(Testimony of Ralph Ledingham Foy.)

shut off, then you can hear the roar of the firebox within 150 feet.

Mr. Tweedt: Q. Did you tell Mr. Westall that it was necessary to remain at the firebox and not leave for even a minute or two minutes?

A. I did not.

Q. The necessity that you state for remaining is peculiar to this particular rig, isn't it?

A. Not particular to any rig that is operated with Diesel engine. You can't hear the roar of [135] the fire.

Q. Isn't it a fact that any necessity for the fireman to remain standing in front of the firebox——

A. That is the fireman's duties.

Q. Let me ask the question, please.

Will you read as far as I got, Mr. Reporter, please?

(The reporter read the question.)

Mr. Tweedt: Q. ——depends wholly upon the condition of the equipment of the barge?

A. No.

Q. Do you anticipate daily on your barge that the fuel will stop flowing?

A. There is always a chance of the fuel stopping flowing at any time on any firebox.

Q. Is the situation, Mr. Foy, in your opinion, any different than if I light the gas furnace in my home and then go up and sit down where I can't watch the fire?

A. Yes, it is. You have a continuous flow of gas which is not liquid and not subject to any stoppage, at all.

(Testimony of Ralph Ledingham Foy.)

Q. You have a continuous flow of liquid on your barge, don't you? A. Until you get stoppage.

Q. You don't have stoppage unless you have dirty fuel or a plugged line, or something of that nature, do you?

A. There is lots of things that can happen to your fuel.

Q. Had you examined the fuel line before the barge was taken on the job?

A. I did not examine the fuel line, but I fired up the boiler and it worked perfectly.

Q. That was an indication, if it worked perfectly, that everything was in good order?

A. It may work perfectly this morning; maybe go a month and not get stoppage.

Q. *When* do you get stoppage from?

A. A little piece of rope yarn may get into the fuel tanks, or in pouring in the Diesel oil [136] you may pick up a dirty bucket and may have some dust in it, and pouring the Diesel oil in there you pour the dirt in with it.

Q. In other words, then, Mr. Foy, the reason for standing constantly at the firebox is the condition of the equipment and the fuel?

A. No; it is not; the fireman is hired for the job of watching the fire. He is not hired for standing out on deck.

Q. When you were present, Mr. Foy, on this occasion that you talked to Mr. Westall, did you take a written statement from Mr. Westall?

(Testimony of Ralph Ledingham Foy.)

A. Mr. Westall at one time made a written statement, but I do not recollect whether it was at that time, or not.

Mr. Tweedt: Have you that written statement, Mr. Darrah?

Mr. Darrah: I can say for your benefit, Mr. Tweedt, that none was taken at that time, but one was taken by me from Mr. Westall on a prior occasion, having nothing to do with the incident in question. I have that statement.

Mr. Tweedt: May I see that statement?

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Tweedt: Q. Mr. Foy, on the line leading from the Diesel barrel to the burner there was no strainer, was there? A. No.

Q. Were you present on the morning of May 16th when the barge commenced operating? I mean, after steam was up and they commenced using the winches? A. Yes.

Q. It is a fact, is it not, that the men present had to do three hours of work before they could use the equipment on the barge?

A. I do not know how much time they put in. I was there for about half an hour. It is altogether according to what type of work, how much time they put in rigging the rig up to do a certain job. The rig was in operation with a clamshell on it at the time it went in. [137]

(Testimony of Ralph Ledingham Foy.)

Q. Were you there long enough and did you see that the winches and the lines would not function?

A. No; I did not.

Q. You stated yesterday that Orville Foy was the bookkeeper for the libelant.

A. That is right.

Q. You also stated that he had no authority to make contracts. How was Mr. Orville Foy's authority established? Was there a resolution of the board of directors? A. No; there was not.

Q. Who established his authority?

A. He did not have any authority.

Q. How was that established?

A. He did not have any authority.

Q. Who told him what he could do or what he could not do?

A. He took care of the books and did odd jobs of checking up, picking up groceries for the boats. There was nobody exactly told him what to do or when to do it.

Q. Was there anybody told him what not to do?

A. It was just according to how far, what things he would do that was in his capacity.

Q. There was no limit fixed expressly on his authority, was there, by the board of directors?

A. No.

Q. He would send out bills on behalf of the libelant, would he not? A. That is right.

Q. And the libelant accepted the money in payment of those bills?

(Testimony of Ralph Ledingham Foy.)

A. Will you repeat that, please?

(The reporter read the question.)

The Witness: Well, let us get the libelant straight here.

Mr. Tweedt: The libelant is the Stockton—— What is it—Rock and Gravel Company?

A. That is right.

Q. Of which you are the vice-president?

A. That is right.

Q. He sent out the bills for the libelant, did he not? A. Yes. [138]

Q. And accepted the money in payment for them?

A. That is right; provided the bills were correct.

Q. The bills that have been introduced here in evidence here, this bill that is Respondent's Exhibit C, that was sent out by Orville Foy?

A. That is correct.

Q. Libelant received the money in payment of that and accepted it, did they not?

A. I could not say they did or I could not say they did not. I never seen the check they received. I work on the outside and never had much to do with the bookkeeping part of it.

Q. You had nothing to do with making contracts? A. I had the power to make contracts.

Q. Who gave you the power?

A. The board.

Q. Who composed the board of directors?

A. My mother and my father and myself are

(Testimony of Ralph Ledingham Foy.)

the officers of the company. What is this $76 on here (indicating on paper)?

(Mr. Tweedt handed the witness another document.)

The Witness: It looks like the rig worked the morning before it burned, or the day before it burned, so there must have been heat on those bricks.

Mr. Tweedt: I will move to strike that out.

The Court: It may go out.

Mr. Tweedt: Q. And then I will ask the witness why it appears from this bill, Respondents' Exhibit D, that the equipment worked.

A. The rig was supposed to have been burned up, or did burn up, on the morning of May 21st. Here is the fireman got in 8 hours.

Q. You are speaking of May 20th?

A. May 20th, they paid the fireman 8 hours at $1.60, or the engineer 8 hours at $1.60 and the fireman 8 hours at $1.10. I guess this is a bill for the [139] men on the job.

Q. The metal pipe that connected with the firebox and connected to the hose that ran to the Diesel fuel barrel ended alongside the boiler, did it not?

A. That is right.

Q. Before you left the barge on May 15 and May 16, 1941, were the fire extinguishers tested?

A. Did I ever test—no, I am not supposed to say that—no, they was not.

Q. When were they last tested, to your knowledge?

(Testimony of Ralph Ledingham Foy.)

A. They was last filled about four months before that time.

Mr. Tweedt: I think that is all.

Mr. Darrah: May I ask one or two further questions?

Redirect Examination

Mr. Darrah: Q. Reference to the itemized statement which you just referred to in your cross-examination by Mr. Tweedt is a statement of Bundensen and Lauritzen showing the time of the fireman and the engineer on this job; is that correct; and referred to as Respondents' Exhibit D?

A. That is correct.

Q. Further calling your attention to Respondents' Exhibits G and F, first taking G, that photograph was taken from what part of the barge?

A. Within four or five feet of the bow, directly standing in the bow of the barge.

Q. Looking toward the stern?

A. Looking toward the stern on the port side.

Q. And that foreshortens the distance further away and makes those in the foreground appear much larger than they are, as for example the position of the boiler as appears in the picture is approximately what with respect to the forward and aft end of the boat?

A. Well, the distance from the bow of this boat to the A frame here is approximately 50, and it don't look like it is 50 feet clear back the whole length of it. [140]

(Testimony of Ralph Ledingham Foy.)

The Court: It is 135 feet altogether, isn't it?

The Witness: 137.

Mr. Darrah: Q. Now, with respect to Exhibit F, which the respondents offered in evidence, is that not likewise foreshortened and taken from the forward position? A. That is right.

Q. Which makes the front part of the barge appear to be much longer?

A. The barge is 36 feet here and 137 there (indicating).

Q. And they appear pretty near the same?

A. They appear pretty near the same distance.

Q. Now, looking at this picture, can you tell me on this picture where the door is that Mr. Westall would have to go through to get to that toilet?

A. That black and white space there is a door, right on the stern of the barge.

Q. That would be——

A. On the starboard stern.

Q. Where would he have to go after going through that door?

A. Go through the house and over in the far corner, another little door in the stern, where the overhang of the toilet is.

Q. On the port side of that deck house?

A. On the port side of the house, there, and from the toilet you cannot see the boiler.

Q. Or the stack? A. Or the stack.

Q. Now, with reference to the fire extinguishers, you said they were fastened one on each side

(Testimony of Ralph Ledingham Foy.)

of the doors leading out of the engine room, as I understand, and on the side of the door, the same side of the door the door was hung on, hinged on; is that correct?

A. Oh, no; the opposite side.

Q. Then there was no opportunity for fire extinguishers to be behind the door?

A. At any time they would not have been behind the door.

Q. These pictures that we just referred to are obviously after the fire, and don't show the deck house or other structures [141] that were burned by the fire? A. That is right.

Q. Now, you said in your statement or in your cross-examination that you did not tell Adrian Westall to stay in constant attendance upon the fire when he was firing up. Why didn't you?

A. A man who has been firing boilers 10 or 15 years, that is his duties. It is not for somebody to tell him to watch a fire. It is understood.

Q. Did Mr. Westall appear to know his business when you were showing him those things?

A. He did. He appeared to be a capable man.

Mr. Darrah: That is all.

The Court: That is all. Step down.

Mr. Darrah: We are ready to rest. It is understood, of course, that the issue of damage is reserved.

Have we met all of your requirements on the demand to produce? We do want your compensa-

(Testimony of Ralph Ledingham Foy.)

tion records, your payroll records, that we demanded.

Mr. Tweedt: I don't know what records you want, Mr. Darrah, or what you want to clutter up the record with. I am willing to stipulate that Mr. Williams and Mr. Westall were, for the days they worked on the derrick barge, including the day of the fire, carried on the payroll records of Bundensen and Lauritzen, and also declared under their compensation policy. Anything else?

Mr. Darrah: And that their services were procured by Bundensen and Lauritzen; Bundensen and Lauritzen contacted them relative to the employment.

Mr. Tweedt: I would rather let the evidence speak for that than stipulate on it.

Mr. Darrah: Would you stipulate that the effect of this [142] exhibit is that it was operated on the 16th, 19th, 20th, and, of course, the testimony shows it was operated on the 21st.

Mr. Tweedt: That the derrick barge operated?

Mr. Darrah: Yes.

Mr. Tweedt: The derrick barge worked on the Bundensen and Lauritzen job at Vallejo on the 16th, 19th and 20th of May, 1941.

The Court: Call your first witness.

Mr. Darrah: And Westall and Williams were on your payroll.

Mr. Tweedt: That is right.

Mr. Darrah: And operated the barge on those days.

(Testimony of Ralph Ledingham Foy.)

Mr. Tweedt. They were the operator and the fireman.

Call Mr. Lauritzen.

HOWARD F. LAURITZEN,

a witness called for the respondent; sworn.

The Clerk: Will you state your name?

A. Howard E. Lauritzen.

Direct Examination

Mr. Tweedt: Q. How old are you, Mr. Lauritzen? A. Forty-seven.

Q. You are one of the respondents in this case?

A. I am.

Q. And you were a partner of Bundensen & Lauritzen. A. I am.

Q. That is a copartnership. What is your occupation? A. General contractor.

Q. How long have you been in that business?

A. Seventeen years. [143]

Q. In May, 1941, were you engaged in a construction job on the Napa River above Vallejo?

A. I was.

Q. Very briefly, what was the nature of that construction job?

A. It was an outfall sewer for the Public Works Department of the United States Navy. There was a new housing project going in, and it was an outfall sewer going across the mud flats.

(Testimony of Howard F. Lauritzen.)

Q. Did Foy No. 2 Derrick Barge do some work on that job? A. She did.

Q. Who arranged for that? A. I did.

Q. Was such arrangement oral or written?

A. Oral.

Q. With whom did you make the arrangement?

A. I made the arrangement with Mr. Foy, Senior.

Q. Did you talk to him personally or by telephone? A. By telephone.

Q. Will you tell us where you called Mr. Foy?

A. I first called—tried to get Mr. Foy at the office in Oakland, and I couldn't get him, so on the 14th I called him at his home—at a telephone number in Stockton which I presumed was his home.

Q. You were familiar with Mr. Foy's voice, were you, then?

A. I was at that time; talked to Mr. Foy several times before.

Q. Was it he that you talked to?

A. It was.

Q. Mr. Lauritzen, I will show you a telephone bill and ask you if that is the telephone bill of Bundensen & Lauritzen for the month of May, long distance calls? A. It is.

Mr. Tweedt: In lieu of putting all these documents in evidence, with the consent of counsel, I would like to read two entries from it only. You may examine it if you want others in subsequently.

[144]

"May 14 Call to Foy, Oakland, .10"

"May 15 Call to Foy, Stockton, .70"

(Testimony of Howard F. Lauritzen.)

Q. Mr. Lauritzen, will you state the conversation you had with Mr. Foy on May 15?

A. I called Mr. Foy and asked him if he had a derrick barge available for some work at Vallejo, and he told me he had the large derrick barge available and it was in condition to work, and then I asked him what his rates were going to be, and he said the rates were $10 per hour but if we used it for less or fired it up there would be a minimum charge for four hours, and that we would have to take care of the fireman's and engineer's wages beyond the four hours, because they had to be paid a minimum of a day's wage when they came out; it was a union rule. Then I asked if the derrick barge was insured and he said it was fully covered by insurance. Then I said, "Your $10 per hour includes the operator, fireman, oil, water, and *the* insurance?" And then he said, "Yes"; and then I said, "Well, that sounds all right. When can we get the barge?"

He said, "We can get it ready and have it out the next day for you." I said, "All right; how about towing it up?" He said he could arrange to have it towed up with his boat and then taken away again, and we would have to pay the towing to and towing out charges. That is as near as I can remember what our conversation was at the time.

Q. The barge did work on the job on May 16, 19, and 20? A. It did.

Q. The fire on the barge occurred on May 21?

(Testimony of Howard F. Lauritzen.)

A. Yes, sir.

Q. Did you receive the original of this bill, marked Respondent's Exhibit A (showing document to witness)? A. Yes, sir. [145]

Q. And what did you do with that original bill?

A. I wrote a letter and returned it to the Stockton Sand & Gravel Co.

Q. I show you Respondent's Exhibit B. Is that the letter with which you returned the bill?

A. Yes, sir, it is.

Q. Did you subsequently to sending this letter receive another bill from the Stockton Sand & Crushed Rock Co.? A. I did.

Q. I show you Respondent's Exhibit C.

A. That is the bill.

Q. Is that the bill you received after sending back the first bill? A. That is right.

Q. The pencil notations on here were put on in your office? A. By my bookkeeper.

Q. You paid that bill? A. Yes.

Q. In the amount?

A. In the amount of—it was paid in the amount of $238.88.

Q. And in making that payment, did you send Respondent's Exhibit D to the libelant (showing document to witness)? A. Yes, sir; I did.

Q. Do you know D. E. Williams and Adrian Westall? A. Yes, I do.

Q. Did you know them in May of 1941?

A. I did.

(Testimony of Howard F. Lauritzen.)

Q. Did they work on the Foy barge on May 16, 19, and 20, 1941? A. They did.

Q. What were their jobs?

A. Westall was fireman and Williams was an operator.

Q. Please state the circumstances under which they went to work on the Foy barge?

A. Well, on the—when the derrick barge arrived over there—well, the day before, I had sent Mr. Kitchen down to Oakland to see that the barge was [146] under way, and then he told me at that time that they would not be—that he had been informed by the Foys they would not be able to furnish an operator with the derrick barge, and on the following night, she arrived over there, he called me and informed me they would not be able to furnish a fireman and that we would have to get them a fireman and operator, and we had this fireman and operator working for me as second shift on my own derrick barge, and I told these men to go over there and work for Mr. Foy on the derrick barge.

Q. Did you pay the wages of these men for the three days they worked, Mr. Lauritzen, on the Foy barge? A. We did.

Q. And you charged those back to the libelant, according to this bill, Respondent's Exhibit D; is that correct? A. That is right.

Q. Did you at any time, Mr. Lauritzen, agree with Mr. Foy, Mr. Foy, Senior, to furnish a crew for the derrick barge? A. No.

(Testimony of Howard F. Lauritzen.)

Q. Did you at any time give Mr. Westall or Mr. Williams any orders as to the operation of the Foy derrick barge? A. No.

Q. Mr. Westall had worked for you on your derrick barge a short time before he was sent over to the Foy barge?

A. Mr. Westall had been in my employ about two weeks prior to that time.

Q. Would you state whether or not his services had been satisfactory?

A. His services were satisfactory; liked him very well.

Q. Do you own a derrick barge, Mr. Lauritzen?

A. I do.

Q. Does it have a vertical boiler?

A. It has.

Q. You also own a pile driver? A. I do.

Q. Does it have a vertical boiler?

A. It has. [147]

Q. Are you familiar with the operation of a derrick barge? A. I believe I am.

Q. How long have you been familiar with them?

A. Well, we have owned this barge perhaps ten years. I have been around boilers many years before that, pile driver boilers.

Q. Was your derrick barge at one time equipped with an automatic fireman? A. It was.

Q. Will you explain briefly what an automatic fireman is?

A. An automatic fireman is that she maintains

(Testimony of Howard F. Lauritzen.)

the steam pressure and the water line in the boiler at a constant thing all the time, without an attendant; in other words, you haven't anybody around it at all.

Q. When you fired your derrick barge with this automatic fireman, was there any human being in attendance on the fire?

A. Not always, no; I would say there was times of as much as two hours there was no man that went down to look at the fire.

Q. From your experience, Mr. Lauritzen, is there any necessity for a fireman to remain in constant attendance when they steam up a boiler?

A. No; I don't believe there is, if the equipment is in good shape.

Q. Now, Mr. Lauritzen, after the fire did you see Mr. Foy, Senior, and Mr. Darrah up on the Vallejo job?

Q. I met them over there one day; went over one day to look at the rig.

Q. This was after the fire?

A. This was after the fire; yes.

Q. Do you recall what day it was?

A. No; I don't recall what day, the day of the week. The particular thing I was interested in that time was getting that derrick barge out of there so that we could proceed with the job. The Navy [148] Department was anxious to have that job completed. The housing project was about completed

(Testimony of Howard F. Lauritzen.)
and they wanted to get the job through. The derrick barge was holding the job up.

Q. On that occasion did you have a conversation with Mr. Foy and Mr. Darrah?

A. I did.

Q. Would you please state what was said?

A. After looking the thing over there, I talked to Mr. Foy about getting the derrick barge moved out of there. I believe he told me as soon as the insurance people were satisfied, he would move it, or they were going to move it. Then the question came up about our verbal agreement with Mr. Foy, which I went over there with him at the time about this agreement and about the insurance on the thing, that the thing that I wanted straight in my mind at the time was that our conversation over the phone was clear, so that the insurance companies wouldn't take subrogation and sue me on the thing, and at the time Mr. Darrah spoke up and said, I believe, "that is the agreement with Mr. Foy. You have nothing to worry about. Mr. Foy will live up to his contract."

Q. What had you stated, if anything, as to the verbal agreement on the insurance?

A. Well, that he was to have it; and he was to carry insurance on the thing; he was to carry insurance on it. He was insured; that was included in the price of $10 an hour, the insurance.

Mr. Tweedt: I think that is all.

(Testimony of Howard F. Lauritzen.)

Cross Examination

Mr. Ellis: Q. Mr. Lauritzen, you say you have been familiar with steam boilers quite a good number of years? A. Yes, sir.

Q. These steam boilers you have on your derrick barge and on [149] your pile driver, they are subject to State inspection, are they?

A. That is right.

Q. And they are regularly inspected?

A. That is right.—They are not inspected, but we carry boiler insurance and the boiler insurance people have their inspectors inspect the boilers.

Q. Are you familiar with the rules of the Industrial Accident Commission with reference to the operation of boilers? A. Not entirely, no.

Q. Do you know what their rules are with reference to attendance on a boiler when it is in service?

A. No; I wouldn't say that I do know that.

Q. Are you familiar with Order No. 850 promulgated by the—Boiler Safety Orders promulgated by the Industrial Accident Commission of the State of California, which reads as follows:

> "No boiler while in active service shall be left unattended, regardless of whether or not it is equipped with automatic water feed regulator, fuel and damper regulators, high and low water alarm, or any form of automatic control. By 'active service' is meant that portion of time when the main stop valve is open and the fires are burning."

(Testimony of Howard F. Lauritzen.)

Are you familiar with that rule?

A. No, sir.

Q. You never heard of it? A. No, sir.

Q. Your work as general contractor involves what, building? Was it building of buildings?

A. No; heavy construction.

Q. Heavy construction of manufacturing plants, and so forth? [150]

A. Pile driving, wharves, docks.

The Court: In this case, a sewer.

The Witness: A sewer.

Mr. Ellis: Q. Yes; I see. Now on the Foy 1, they did the work on that, didn't they; I mean the Foys furnished the crew for that; didn't they?

A. That is right.

Q. And one of the bills that they sent you included the work for both jobs, did it not? I mean for the rental of the Foy No. 2 and also the service of the Foy 1; is that right?

A. They were separate bills.

Q. Didn't you receive a bill for $677—You received this bill, did you not, from Stockton Sand and Crushed Rock (showing document to witness)?

A. I received this statement, yes.

Q. That is for $637.77?

A. That is right.

Q. And it is billed under date of June 30, by the Stockton Sand & Crushed Rock to Bundensen & Lauritzen? A. That is right.

Q. And that $637.77 included $75 for towing the barge back, did it not?

(Testimony of Howard F. Lauritzen.)

A. I don't remember just what the figures are. I presume it was, yes.

Q. And included the $315 for the rent of the Foy 2, less the wages you paid?

A. That is right.

Q. And also included the amounts for the Foy 1?

A. That is right. That sttaement included all that.

Mr. Ellis: We will offer this bill in evidence.

The Court: It may be admitted and marked.

(Thereupon the bill referred to was received in evidence and marked Libelant's Exhibit No. 1.)

LIBELANT'S EXHIBIT No. 1

(Billhead)

Oakland, Cal., June 30, 1941

M Bundesen & Lauritzen,
Pittsburg, California.

In Account with
Stockton Sand & Crushed Rock Co., Inc.
River Sand—Crushed Rock—Towing
Clam Shell Digging and Unloading—Pile Driving
Hotel San Pablo

All Bills Due 10th of Month following Delivery

Statement (Itemized bills already rendered) $637.77

Mr. Ellis: Q. And, Mr. Lauritzen, in the letter of [151] July 8, which has been introduced in evi-

(Testimony of Howard F. Lauritzen.)

dence as Respondent's Exhibit E, which begins, "Attached is our statement covering the work done for your company during the month of May, 1941, at your Vallejo job," this statement of $637.77 was included with this letter, was it not?

A. I presume that it was.

Q. Have you ever had any experience firing boilers; did you ever fire a boiler?

A. I have.

Q. What kind of boiler?

A. Vertical boiler; donkey boiler; Scotch boiler.

Q. In the experience you have had, how did you start the boilers that you have been familiar with?

A. Well, we started with wood.

Q. That is, you built a fire? A. Yes.

Q. Did you ever have any experience starting them with Diesel oil?

A. Well, starting off, yes; I have.

Q. And where it comes in by gravity feed, similar to this barge?

A. The pile driver is operated by Diesel at all times.

Q. I mean where you start up on Diesel oil and then change over to the crude oil.

A. Yes; that is right.

Q. That is a rather common form of installation?

A. I wouldn't say it was. On this particular piece of equipment of ours, fired with Diesel oil,

(Testimony of Howard F. Lauritzen.)

later I hooked it up to the compressor just for a temporary arrangement.

Q. That is on your rig? A. Yes.

Q. How do you start with that Diesel oil on your rig?

A. Place a burning rag in the furnace, turn the air on, then the oil, and gradually bring it up.

Q. You burn Diesel oil all the time, do you?

[152]

A. On the pile driver the boiler operates on Diesel oil all the time.

Q. And in starting it you are faced with the same situation they were with reference to the fact you had no steam and had to use air pressure to atomize to start; is that correct?

A. The general practice on the pile driver is to start with wood; we don't use air on it, just once in a while.

Q. Did you ever start it yourself using the air?

A. I have.

Q.The air would be used to atomize the Diesel oil?

A. That is right.

Q. How long did it take you to get up steam using that method, so you could atomize with steam?

A. About an hour; you shouldn't take it faster than an hour or you will ruin the boiler.

Q. You take it rather slowly?

A. Yes; three-quarters of an hour.

Q. Did you throw a burning rag in there when you used the Diesel oil to start with? A. Yes.

(Testimony of Howard F. Lauritzen.)

Q. Did you light the rag first and then throw it in?

A. No; hold it right in the door and light the rag and throw it in.

Q. When do you turn off your air?

A. When the steam is—When you get this steam pressure.

Q. That would take about an hour?

A. Yes.

Q. Is the oil coming in under pressure or by gravity? A. Gravity.

Q. The boiler is gravity feed altogether?

A. That is right.

Q. And in all of your experience in that barge, did the fire ever go out?

A. No; I don't think the fire went out for [153] me, as I remember. I fired it several times.

Q. Did you ever have an occasion on the barge where the fire did go out?

A. No; not when it is firing up.

Q. Later on, did you? A. Oh, yes.

Q. What would be the result?

A. There would be a flare-back; if the boiler was hot you would get a flare-back.

Q. Did you ever lose a barge?

A. No, sir.

Q. You had somebody in attendance right there when the flare-back came and he controlled it?

A. Not necessarily; no.

Q. What would be the procedure when you would get a flare-back?

(Testimony of Howard F. Lauritzen.)

A. Just get a "Whoof!" and blow the boiler door off. If your face was right there you would get burned.

Q. Would it be dangerous to have that flare-back come—I mean for the fire to go out with no one in attendance.

A. I don't think there would be any danger if the fire went out.

Q. The oil would keep coming, wouldn't it?

A. Yes; it would keep coming—well, I don't know if it would or not; it may or may not. What would cause the fire to go out?

Q. I don't know. I just understood they do go out sometimes.

A. The only think that would cause the fire to go out would be a plug in the line.

Q. That might happen?

A. If you didn't have strainers in your line; if the oil was not clean; if the connection in the pipe—something like that would cause some trouble.

Q. If it did go out you might have trouble with the oil coming in with no fire?

A. It wouldn't ignite if the bricks weren't hot enough to cause it to ignite.

Q. How long would it take the bricks to get hot enough? A. I would say half an hour.

Q. You are speaking of a cold boiler?

A. Yes. [154]

Q. If you operate a boiler one day, isn't there quite a bit of heat retained the next day?

(Testimony of Howard F. Lauritzen.)

A. There is.

Q. You don't say it would take about half an hour to get hot enough then?

A. I would say at least twenty minutes.

Q. How long have you known Captain Foy?

A. I don't know just how long I have known Captain Foy. I have known of the Foys for many years. I was born and raised on the river. Mr. Foy has been around there many years.

Q. Do you know he is a little deaf?

A. What is that?

Q. Do you know he is a little deaf?

A. Yes; I know he is a little deaf.

Q. This conversation you said you had with him, is it your statement that you, in effect, said exactly what you said in that letter; in other words, that you repeated back to Captain Foy that the rental was to include the operator and fireman, and water, fuel, oil, and insurance? A. That is right.

Q. In other words, you repeated that back over the phone to him? A. That is right.

Q. Mr. Foy told you that they were insured, didn't he?

A. He said the equipment, the barge, was fully covered with insurance.

Q. And he said nothing about giving you any benefit of any insurance, did he?

A. He said that—when I repeated to him then about including the time per hour on the insurance —yes, he did, that it would include the insurance.

(Testimony of Howard F. Lauritzen.)

Q. He did not say you were to get the benefit of the insurance; what he said was, "Yes, we have insurance protecting us"?

A. No; he said, "The derrick barge is fully covered with insurance." That, "the derrick barge is fully covered."

Q. Did he say, "we"?

A. I think he said, "We were fully [155] covered," meaning him and the derrick barge.

Q. He didn't at any time say that you were protected by that insurance, Bundensen & Lauritzen had the benefit of that insurance; he never at any time said that, did he?

A. No; he did not say those words.

Q. When did you say was the first time that you knew that you were to have to furnish the crew?

A. The first time I knew I was going to have to furnish the operator, furnish an operator, get an operator, for you was on the day that the derrick barge came up there—the day before, I guess, when Mr. Kitchen went down to see that the derrick barge got started off. When he came home he told me that they were not going to have an operator.

Q. They started towing it down there on the 15th, did they, the day before you operated?

A. They brought it up the evening of the 15th.

Q. You saw Kitchen went where, over to where the barge had previously been?

A. Yes: down to Alameda, I believe.

Q. What was his purpose in going over there?

(Testimony of Howard F. Lauritzen.)

A. To see that the barge got away. We had to get it up there that evening in order to get it in on the tide.

Q. Did he go on board the barge, do you know?

A. That I don't know.

Q. Then when he came back, you say he told you, "They haven't got any crew. You will have to get a crew for it"; or words to that effect?

A. He says, "They will not be able to furnish their operator because he is on another job." We would have to get them—get another operator for them.

Q. When did you see Westall then?

A. I saw Mr. Westall the night that she arrived on the job over there, your derrick [156] barge arrived on the job; that was the night of the 15th.

Q. About what time was that?

A. Oh, I saw Westall—— It was in the—— Well, I should judge around seven or eight o'clock, maybe nine o'clock, in the evening.

Q. Did Westall come on the barge that night?

A. On which barge?

Q. On the Foy 2, the one we are talking about?

A. No; he didn't come on the barge that night.

Q. Did you contact the union hall?

A. I don't remember if I did or not.

Q. You say Foy was working on another barge for you at that time? A. No; I did not.

Q. How did you get in touch with Westall?

A. Westall was working for me at the time.

(Testimony of Howard F. Lauritzen.)

Q. That is what I am talking about.

A. You said Foy.

Q. I misstated the name. Westall was then working for you? A. That is right.

Q. Where did you find him?

A. On our derrick barge.

Q. You went over and told him, "We are going to need you on this other barge"; is that right?

A. No; I told him he was to go and work on the Foy derrick barge for Mr. Foy on the following day; they wouldn't have a fireman and we were going to loan him to the derrick barge.

Q. Where did you get Williams?

A. He was on the derrick barge on the same shift as Mr. Westall.

Q. They had worked as a crew together before?

A. That is right.

Q. How big is the barge they were working on?

A. Forty by eighty.

Q. What kind of a boiler does it use?

A. Vertical boiler on it. [157]

Q. How is that started?

A. Started by a wood fire and operates on fuel oil.

Q. Crude oil? A. Heavy fuel oil.

Q. Heavy fuel oil? A. That is right.

Q. It did not have any Diesel oil starter on it?

A. No, sir.

Q. Did Williams go over there that evening?

(Testimony of Howard F. Lauritzen.)

A. No; he did not.

Q. When did Williams come aboard?

A. I believe Williams went aboard your barge the following morning, the morning of the 16th.

Q. Were you there when it came in?

A. No; I was not.

The Court: It is a quarter after twelve. Will you be able to get through with this witness?

Mr. Ellis: No, I think not right now.

The Court: Very well. We will adjourn until two o'clock.

(Thereupon, at 12:15 p. m. an adjournment was taken until 2:00 o'clock p. m. this day.)

[158]

Afternoon Session

Mr. Ellis: Q. Mr. Lauritzen, I will show you this daily time card for Bundensen & Lauritzen, dated May 16, 1941, covering Job No. 375. I will ask you if that is the time card for work done by derrick barge, Foy No. 2, the one we are talking about, on the 16th?

A. Yes; this is the time card for that day.

Q. And the notations on the card are with reference to that job? A. That is right.

Mr. Ellis: I ask that this be marked and offer this in evidence as libelant's exhibit next in order.

(The time card referred to was thereupon received in evidence and marked Libelant's Exhibit No. 2.)

(Testimony of Howard F. Lauritzen.)

LIBELANT'S EXHIBIT No. 2

Job No. 375 Date May 16-41

DAILY TIME CARD

Bundesen & Lauritzen
Pittsburg, California

Shift from 5 A. M. to 12:15 M.

Equipment Foy Derrick Barge	Setting Up Pumps	Rigging	Clamming	Framing		
Name and No.					Ttl. Hrs.	Rate
C. F. Webster		3		5	8	1.40
Paul Johnson		3	5		8	1.40
Ray Sparrow		3	5		8	1.40
W. Wasson		3		5	8	1.40
Herb Mitchell	3		5		8	.80
D. E. Williams					8	1.60
A. Westall					8	1.10
R. Hyde		3		5	8	1.70

Foy Derrick hrs. 5 A. M. to 12:15
Clammed 5 hrs.
Rigged 3 hrs.

8 hrs.

Remarks: Condition of Foy Derrick necessitated 3 hrs. of rigging before ready to operate.

Foreman ROBERT HYDE

Mr. Ellis: Now, I will show you this time card—

The Court: There is no objection to all these time cards going in?

Mr. Tweedt: No, your Honor. I might ask, are these time cards needed at all in connection with the Navy Department any longer?

(Testimony of Howard F. Lauritzen.)

The Witness: Not as far as I know.

The Court: We are wasting a lot of time in this case, gentlemen.

Mr. Ellis: Would you prefer that I read them into the record? This is the time card, Job No. 375, Bundensen & Lauritzen, dated May 16, 1942; shift 5:00 a. m. to 12:15 M., for the derrick barge and carries among eight men on the time card, among whom are listed A. Westall working eight hours at $1.10 an hour, and D. E. Williams working eight hours at $1.60; with the further notation—I guess this is stipulated—prepared by Robert Hyde, foreman on the job. [159]

Mr. Tweedt: Yes.

Mr. Ellis: With the notation "Foy derrick hours 5:00 a. m.—12:15, clam 5 hours, rig 3 hours, total eight hours." Under "Remarks": "Condition of Foy derrick necessitated three hours of rigging before ready to operate. Signed, Robert Hyde."

Q. I show you another time card on the 19th, covering the same job. A. Yes.

Q. Is that correct? A. That is right.

Q. This shows A. Westall and D. E. Williams working 5:00 a. m.—12:15 M. on the Foy derrick barge, eight hours each.

Then on the 20th, this time card shows the situation with reference to the 20th and the work done on that day? A. Yes; it is the——

Mr. Ellis: On the 20th they worked from 5:00 a. m. until 12:15 M., which would be noon, eight hours each.

(Testimony of Howard F. Lauritzen.)

I offer these three time cards, 16th, 19th, and 20th, in evidence.

(The time cards referred to were thereupon received in evidence and marked Libelant's Exhibit No. 3.)

LIBELANT'S EXHIBIT No. 3

Job No. 375 Date May 21

DAILY TIME CARD

Bundesen & Lauritzen
Pittsburg, California

Shift from 5 A. M. to 12:15 P. M.

Equipment

Foy Derrick
Barge

Name and No.			Fighting Fire	Ttl. Hrs.	Rate
C. F. Webster	√	Pd.		6	1.40
Paul Johnson	√	Pd.		6	1.40
Ray Sparrow	√	Pd.		6	1.40
W. Wasson			x	6	1.40
Herb Mitchell			x	8	.90
Leroy King	√	Pd.		5½	.80
Fred Martin	√	Pd.		5½	.80
H. E. Branyon				8	.80
D. E. Williams			x	4	1.60
A. Westall		Check		6	1.10
Al Stocker		"		4	1.40
R. Hyde				6	1.70

Westall, 1814 Central Ave., Alameda, Calif.

Remarks:

Foreman ROBERT HYDE

(Testimony of Howard F. Lauritzen.)

Job No. 375 Date 5/20/41

DAILY TIME CARD 19th

Bundesen & Lauritzen
Pittsburg, California

Shift from 12 A. M. to 8 P. M.

Equipment Barges Lumber	Reclaiming Lumber Labor	Moveing Barges (Overtime)	Frameing	Pushing		
Name and No.					Ttl. Hrs.	Rate
F. Pettibone				12	12	1.70
E. McCullough		2	8		12	1.40
C. Holter		2	8		12	1.40
G. Riise		2	8		12	1.40
E. Jackson	8				8	.80
E. Lovely	8	2	(8)		12	.80
C. Martin	8				8	.80
G. Parker	8				8	.80
W. O. ———?		2	8		12	1.40

Here's white ticket Will send name next report.

No steam on this sheet.

Remarks: Tide bad. High wind. Hand work. Had to use Spanish windlass. Barges drew mud.

Foreman FRANK PETTIBONE

(Testimony of Howard F. Lauritzen.)

Job No. DAILY TIME CARD Date 5-19-41
Bundesen & Lauritzen
Pittsburg, California
Shift from 5 A. M. to 12:15 P. M.

Equipment	Clamming	Framing		
Foy Derrick				
Barge				
Name and No.			**Ttl. Hrs.**	**Rate**
C. F. Webster		8	8	1.40
Paul Johnson	4	4	8	1.40
Ray Sparrow	4	4	8	1.40
W. Wasson		8	8	1.40
Herb Mitchell	4	4	8	.80
D. E. Williams			8	1.60
A. Westall			8	1.10
R. Hyde		8	8	1.70

Foreman ROBERT HYDE

Job No. 375 DAILY TIME CARD Date May 20
Bundesen & Lauritzen
Pittsburg, California
Shift from 5 A. M. to 12:15 P. M.

Equipment	Clamming Rigging	
Foy Derrick		
Barge		
6″ Pump		
Name and No.	**Ttl. Hrs.**	**Rate**
C. F. Webster	8	1.40
Paul Johnson	8	1.40
Ray Sparrow	8	1.40
D. E. Williams	8	1.60
A. Westall	8	1.10
Herb Mitchell	8	.90
Fred Martin 556-14-1151	8	.80
H. Branyan 556-05-5070	8	.80
L. King 552-20-9010	8	.80
R. Hyde	8	1.70

Remarks: Broke #2 line clamming.

Foreman ROBERT HYDE

(Testimony of Howard F. Lauritzen.)

Mr. Ellis: Q. Mr. Lauritzen, at the time you had the conversation with Mr. Foy when you were negotiating for the barge, at that time you did not contemplate using your own crew, did you?

A. I did not.

Q. At that time you though they were going to furnish the crew? A. That is right.

Q. As a matter of fact, didn't Mr. Foy tell you then they didn't have a crew and you would have to furnish one? A. No.

Q. He did not? On the morning of the 16th you had—the barge had a different rigging than you wanted; is that correct?

A. I was not there on the barge or on the job the morning she [160] was working. I did not see the derrick; wasn't over there; so the only thing I have is what is on that card there.

Q. The time you saw Mr. Foy and Mr. Darrah over there at the barge, I think it was the day after the fire, do you recall that?

A. I think I saw them—it was several days after the fire. It was after the fire, yes, sir.

Q. Mr. Foy was trying to locate the fireman in order to see what happened on that morning, do you recall?

A. That I don't know, if he was over there for that purpose. I think he asked me about the fireman at that time.

Q. He was trying to locate the fireman to see

(Testimony of Howard F. Lauritzen.)

just what did happen that morning?

A. That is right.

Q. I will ask you this: You recall a conversation there with Captain Foy on that day at the service station?

A. I had a conversation with him.

Q. Was the conversation to this effect, that Captain Foy asked you where this man Westall would be or was, and you replied, "I don't know. I got him through the union. We could get him through the union hall; probably get his address through the union hall"? A. Yes.

Q. Then you said to Captain Foy, "You know I asked you if she was insured"; do you recall that?

A. No; I don't.

Q. Do you recall Captain Foy's answer, "Yes; I told you we were fully covered but that was only for all kinds of risks, not for the full value"; do you remember him saying that?

A. No; I don't remember him saying that.

Q. Do you remember asking him how much insurance he had?

A. No; I don't remember asking how much insurance he had?

Q. Didn't he say he only had $12.000?

A. No; he did not. [161]

Q. And you said, "That is too bad."

A. No.

Q. You don't recall any of that conversation at all? A. No.

Q. This bill—have you the bill for $677?

The Court: That bill is in evidence.

(Testimony of Howard F. Lauritzen.)

Mr. Ellis: I guess it will be stipulated too that the insurance policy or compensation insurance carried by Bundensen & Lauritzen on Mr. Westall and Mr. Williams, that the interest of the employer in that could not be assigned to any other person if there is a policy in effect.

Mr. Tweedt: I don't quite understand the question. Bundensen & Lauritzen carried Workmen's Compensation. Under that policy they declared Williams and Westall.

Mr. Ellis: As their employees.

Mr. Tweedt: As their employees. I don't see what that has to do with the case. Workmen's Compensation covers only accidents. There are no accidents in this case.

Mr. Ellis: The policy provides they couldn't assign their interest to any other person.

Mr. Tweedt: I think it could. Almost invariably when his employees went to work for other persons, the other people declared them. If you can find that in your policy, you can put this specimen policy in evidence.

Mr. Ellis (referring to document): There is this clause in this policy: "It will be understood the interest of the employer in this policy cannot be assigned to any other person or organization."

Mr. Tweedt: I will stipulate the policy so provides.

Mr. Ellis: That is all.

Mr. Tweedt: I want to look at these time cards.

I have an idea you got the wrong ones in. Did you intend to show by [162] these that these two men appeared on the cards? If you did, I think you put the wrong cards in evidence. Here is one card with Williams and Westall on. Here is another card with Williams and Westall on. This one does not have them. This one does not have them.

Mr. Ellis: I guess I got the wrong ones in there.

Mr. Tweedt: That one does not have them. That one does not have them, and these two have them.

Mr. Ellis: We will add these two to the exhibits, then.

The Court: Are there further questions from this witness?

Mr. Tweedt: No further questions, your Honor.

The Court: Step down.

Mr. Tweedt: Mr. Kitchen.

ROBERT P. KITCHEN,

a witness called for respondent, sworn.

The Clerk: Will you state your name?

A. Robert P. Kitchen.

Direct Examination

Mr. Tweedt: How old are you, Mr. Kitchen?

A. Thirty-five.

Q. What is your present occupation?

(Testimony of Robert P. Kitchen.)

A. My present occupation is machinist superintendent.

Q. Where are you working?

A. Marin Shipyard.

Q. What was your occupation in May of 1941?

A. Construction superintendent.

Q. For whom?

A. Bundensen & Lauritzen.

Q. And how long had you, in 1941, been engaged in the construction business?

A. Oh, I have been in it since about 1928, somewhere around in there.

Q. How long had you worked as superintendent for Bundensen & [163] *and* Lauritzen?

A. About eighteen months.

Q. Were you superintendent for Bundensen & Lauritzen on the sewer job above Vallejo on May 21, 1941? A. Yes, sir.

Q. Where was the Foy No. 2 derrick barge located at the time of the fire on board?

A. About a quarter-mile above the Sears Point cut-off bridge above Vallejo on the Napa River.

Q. Had you seen the Foy No. 2 prior to her arrival at that job? A. Yes; I had.

Q. Where did you see her?

A. At the Associated Oil Dock at Alameda.

Q. Do you recall what day it was?

A. It was on May the 15th.

Q. What was the occasion for your going aboard the barge at that time?

(Testimony of Robert P. Kitchen.)

A. Well, I wanted to be sure the barge got up to Vallejo in time to catch the flood tide and come in on the mud flat there. They got away in time to make the flood tide and had the right instructions where to go.

Q. Were you present when the barge arrived at the job at Vallejo? A. Yes, sir; I was.

Q. Do you remember when it was the barge arrived?

A. I would say around about between five and six p. m.

Q. On what day? A. On the 15th.

Q. On the day the barge arrived, did you have any conversation with Mr. Ed Foy?

A. Yes; I did.

Q. Did you have any conversation with Ralph Foy? A. Very little.

Q. Was Mr. Ed Foy on the barge when it arrived at the job? A. No; he was not.

Q. He arrived subsequently?

A. He was ashore.

Q. And on that same day—will you please state the conversation you had with Mr. Ed Foy?

A. Well, the best [164] I can remember, it was just about dusk in the evening and we discussed bringing the barge in over the mud flat and he told me that he couldn't furnish the crew for the barge, and we were kind of stuck for men at the time, and it was almost impossible for us to furnish them, as experienced men at that time were not available,

(Testimony of Robert P. Kitchen.)

and it meant robbing another job. I explained that to him, and he had to have—he himself was the operator and he had to be on another job that was going to start the next morning.

Q. When you state "he" you are referring to Ralph Foy?

A. Ralph Foy; and I agreed to take off some men off another job and turn over to him. He was to stay there and instruct the men so that they were capable of carrying out the duties of the barge there to his satisfaction.

Q. Were you on board the barge the morning of May 16? A. Yes; I was.

Q. Who was on board at that time?

A. We had a crew on there, a pile driving crew, and we had—there was an operator and fireman and Ralph Foy, and I think his fireman was there.

Q. Did Ralph Foy and the fireman that was with him remain on board her that day?

A. A short time that morning.

Q. Did you have any conversation with Ralph Foy with respect Mr. Westall before he left the barge? A. Yes; I did.

Q. What was said at that time?

A. I asked him if the men were competent in taking care of the barge and performing their duties there that we expected the barge to perform.

Q. How many days did the barge operate prior to the fire on that job?

A. I think it was three days, if I am not mis-

(Testimony of Robert P. Kitchen.)

taken. We had a week in there we didn't operate her. [165]

Q. Were you aboard her from time to time during those three days? A. Yes, sir; I was.

Q. Did you observe her operation during those days? A. Yes.

Q. Did you observe the condition of the barge?

A. Yes.

Q. What did you observe as to the condition of the hull of the barge?

A. The hull was in very poor shape, dry rot all over the deck; deck beams were dry rot and she was making a little water.

Q. What effect did her leaking have upon her operation in doing your work?

A. Well, the only thing is we had to try to keep her pumped out, keep her dry, otherwise she would drag on the mud flats, and for moving we would be drawing too much water.

Q. What if anything did you observe as to the condition of the deck on the barge?

A. Very poor. You had to watch your step there that you didn't fall through.

Q. What was the condition of the deck in the fire room?

A. There was a cake of oil caked over and it was a regular fire hazard by itself.

Mr. Ellis: Just a minute. We object. We ask that that stand out on the ground it is calling for the conclusion of the witness, if your Honor please.

(Testimony of Robert P. Kitchen.)

The Court: It may go out. You may develop what the situation was.

Mr. Tweedt: Q. Will you describe in detail for us the oil that you have referred to caking on the floor of the fire room?

A. Just an accumulation of oil from service previous over a number of months, I imagine; I don't know how long it would be—it had been that way, but it was built up crude oil and dirt or a collection of debris on it.

Q. Did the deck of the fire room show any signs of having been [166] steamed recently?

A. No, sir.

Q. Will you describe for us the connection between the Diesel fuel barrel and the fire box?

A. Well, it had an auxiliary connection there on the regular burner, the oil line, for steaming up, and then—I think it was about a three-eighths or half-inch line, steel line, and it was approximately three or four feet long; three feet, I would say, running vertical and the hose was connected off that, and the hose was extended, oh, I would say, from the boiler to the outside of the house which was about, oh, about ten or twelve feet long, something like that, and the can that the Diesel oil was in was on the side of the house, on the port side, up high enough so it would get a gravity flow, which was about seven or eight feet above the deck; and I don't recall whether there was a valve on the can or not. There was a valve next to the burner.

(Testimony of Robert P. Kitchen.)

Q. Were there any strainers in that line?

A. None.

Q. Now, what did you observe as to the operation of the equipment on the barge; that is the winches and drums and lines?

A. Well, I know we spent a considerable amount of time that morning in getting the derrick to operate itself in order to overhaul the lines off the drums. They should roll fairly easy with the brakes released, and they had to be made safe, because we had a number of men working under the boom and around that equipment, and it had to be made safe, otherwise you couldn't operate; and it seems to me there was something wrong with the brake bands on it. They would either release all at once or otherwise you wouldn't be able to use them at all. They would take hold in such a way you couldn't overhaul the drums at all.

Q. Did you have any difficulty with the men working on the coffer dam as a result of the operation? A. Yes; I did. [167]

Q. Will you state what that was?

A. It was very—It was hard to keep these men where they belonged, on account of the operation of the derrick. Whenever you picked up a load it was never reliable whether you were going to take it out of there or let her fall, and take a bunch of union men, as a rule they are very hard to get along with when you have a piece of equipment around like that.

(Testimony of Robert P. Kitchen.)

Q. Were you on the barge, Mr. Kitchen, at any time on the day of the fire?

A. Yes, sir; I was.

Q. When did you reach the barge?

A. At about five o'clock in the morning.

Q. Did you go on the barge?

A. Yes; I did.

Q. What did you do?

A. I went aboard the barge, and as soon as I saw the condition and what was taking place I left and got the fire department, which I had to go back to Vallejo to get to a telephone and call the department, and they had to call the County department, and between the two of them, they come down and got hose enough to reach the barge.

Q. Did you do anything on board the barge to fight the fire?

A. Yes; all we could do was get some of the debris out of the road there so it wouldn't spread any more than possible and try to get that bilge pump on the stern of the barge to operate.

Q. Were you able to operate that pump?

A. After a considerable loss of time.

Q. Was there a hose connected to that?

A. There was a hose there but it was not in very good shape and was not long enough to reach the fire in any case. It only reached just past the water tanks.

Q. Was there any other pump on board the barge that you saw? A. No; there was not. [168]

(Testimony of Robert P. Kitchen.)

Q. What experience have you had, Mr. Kitchen, with operating derrick barges with vertical boilers?

A. I have operated them with all types of boilers, equipment of various sizes, all the way from—well, since I was practically a kid.

Q. Have you actually operated them yourself?

A. Pardon?

Q. Have you actually operated them yourself?

A. Yes; I have.

Q. Now, bearing in mind the type of boiler on the Foy No. 2, from your experience was there any necessity of the fireman remaining constantly before the firebox after lighting the fire?

A. No; there was not.

Q. Mr. Kitchen, you will recall that on the stern of the barge there was a house, crew's quarters.

A. Yes, sir.

Q. There was a lavatory in the crew's quarters?

A. Yes; there was.

Q. Showing you Respondent's Exhibit F, the house that appears on the stern of that barge is the crew's quarters? A. Yes.

Q. Were the crew's quarters, Mr. Kitchen, locked or unlocked?

A. The crew's quarters was locked.

Q. And why was that?

A. We did not want the crew going back there and stalling for time, which they generally do. It is a good place for them to go. Another thing, there was equipment in there we did not want stolen,

(Testimony of Robert P. Kitchen.)

taken out, that we would have had to replace had it been lost.

Q. Was the crew's quarters locked at all times the barge was up there?

A. It was. That was one of the first things I instructed to have done.

Mr. Tweedt: I think that is all.

Mr. Darrah: I did not get quite all the last answer.

(The reporter read the answer.) [169]

Cross Examination

Mr. Darrah: Q. One of the first things you instructed to have done was to have the crew's quarters locked? A. Yes.

Q. Were they locked, as far as you know, on the morning of the 21st?

A. They were locked up until the day before, but there was no reason for them to be unlocked that morning.

Q. Who had the key?

A. There was no key that I know of.

Q. Could they use the toilet?

A. No, sir; not without going in the door.

Q. If they wanted to go to the toilet, how did they arrange it; did they have to come to you for the key?

A. They generally went over the side.

Q. Did any of them ever come to you for the key? A. No, sir.

Q. What equipment was stored in there?

(Testimony of Robert P. Kitchen.)

A. Dishes and a Butane stove, I think, cooking utensils, bedding—I don't think there was any——

Q. Tools?

A. I don't believe there was any tools there. There might have been, but I never observed it close enough for that.

Q. You stated you had operated all kinds of boilers, that is, steam boilers, ashore?

A. No, sir, afloat.

Q. You said that it was not necessary for the man to remain at the firebox. Isn't it good practice for the fireman to stay in attendance on his fire when he has steam up?

A. If the equipment is in good shape, it is not.

Q. Are you familiar with Boiler Safety Order No. 850, which requires——

A. What you are referring to we don't observe in the Bay area here; we haven't, and nobody else around here.

Q. It is the Boiler Safety orders under the——

A. Yes. [170]

Q. ——the Industrial Accident Commission, is it not? A. That is right.

Q. And you are not familiar with those orders?

A. I have never read them over.

Q. Do you know about this one—you heard it read before in court—"No boiler while in active service shall be left unattended." Did you ever hear of that one?

A. What do you mean by attended?

(Testimony of Robert P. Kitchen.)

Q. I don't know. I am not answering the questions. You are. Did you ever hear of that rule?

A. It is depending on how you interpret it.

Q. Did you ever hear of the rule? A. No.

Mr. Darrah: We will offer in evidence these rules. I presume the Court takes judicial notice of them.

The Court: It may be admitted and marked.

(The document referred to was thereupon received in evidence and marked Libelant's Exhibit No. 4.)

Mr. Tweedt: It is incompetent, irrelevant and immaterial in any case. We are dealing with a derrick barge afloat on the navigable waters of the United States.

The Court: What is this?

Mr. Tweedt: These are State rules of the State Industrial Accident Commission.

Mr. Darrah: They have testified these men were carried under compensation under the provisions of the State law.

Mr. Tweedt: There has been no testimony that the men were carried under Workmen's Compensation under the State law. There has been testimony they were insurd for Workmen's compensation.

Mr. Darrah: Workmen's Compensation relates to the State law. [171]

Mr. Tweedt: I am aware that Workmen's Compensation relates to the State law, but there is such a thing as Workmen's Compensation that may be compulsory or that may not be compulsory. The

(Testimony of Robert P. Kitchen.)

Supreme Court of the United States has recently held that Social Security applies to seamen at sea but that does not mean that state inspection rules apply to seamen at sea or on navigable waters.

Mr. Darrah: We submit the rules are applicable, and if for no other reason, they show standards of conduct that have been prescribed and accepted. I submit they are the law and govern this operation.

The Court: But they answer that by saying, "We are out on the waters here. We are not subject to that regulation."

Mr. Darrah: It will take a word or two to go into it.

Mr. Tweedt: I have no real objection to their being received in evidence and considered although I would like to reserve that objection to it.

The Court: Very well.

Mr. Darrah: It is our contention that it was not under the provisions where it is subject to Federal inspection where passengers or freight are carried for hire. This was neither, therefore it should be covered by the state regulations and was.

Q. Now, Mr. Kitchen, you said something about that it was not necessary for a man to stand at the door of his firebox. Don't you think a man ought to, at least during the time he is generating steam, stay within sight of the firebox?

A. Not necessarily.

Q. Would you think it was good practice to go out of the building the fireroom was in and go

(Testimony of Robert P. Kitchen.)

around to another part of the [172] building and go into another building?

A. Not as long as you are in sight of the stack and close enough or within sight.

Q. Would a man in the toilet be in sight of the stack? A. Pardon?

Q. Would a man in the toilet be in sight of the stack?

Mr. Tweedt: I will object to that as assuming something not in evidence. I don't recall any testimony in this case, any testimony that the man went into any enclosed toilet. He used the word "toilet" in a very modest sense. I will demand production of the statement you took from Mr. Westall. What it says is he went out onto the deck to urinate, your Honor.

Mr. Darrah: I took the statement on May 22, 1941. If you wish, we will offer it in evidence.

Mr. Tweedt: Very well.

The Court: What does it disclose?

Mr. Darrah: It is a statement generally about the whole situation of the case.

The Court: What are you offering it for?

Mr. Darrah: Because Mr. Tweedt asked for it. I think the whole thing should come it.

The Court: Then read it, so I can follow it.

(Mr. Darrah thereupon read from the statement referred to, and during the reading was interrupted and the following took place.)

The Court: Ten minutes to what?

(Testimony of Robert P. Kitchen.)

Mr. Darrah: Ten minutes to four a.m.

The Court: Why did he start at that time?

The Witness: He came in a little early to start up. We worked early to work the tides. [173]

The Court: All right.

(Mr. Darrah thereupon completed the reading of the statement referred to.)

Mr. Darrah: I ask that this be marked as our next exhibit.

The Court: You took this down?

Mr. Darrah: Yes; I took this down and he signed each page and I gave him a copy immediately after.

(The statement referred to and read by Mr. Darrah was thereupon received in evidence and marked Libelant's Exhibit No. 5.)

LIBELANT'S EXHIBIT No. 5

A. A. Westall interviewed May 22, 1941, relative to burning of Foy Derrick Barge #2 located at job of Bundensen & Lauritzen at Vallejo.

I went to work as fireman on the above derrick barge Friday, May 16, 1941. I had been working several days on a company owned barge before that. The first morning we went out the engineer and fireman who had been on the barge under the owners, Foy, showed me how to fire it up—where the valves were, etc. They fired it up that morning. I had had no previous trouble with the boiler. The method of firing the boiler was to start a little gas engine near by to pump up air pressure which atom-

(Testimony of Robert P. Kitchen.)

ized the fuel when it was forced into the burner. I started that engine, soaked a rag in oil from the 15 gallon tank and threw the burning rag into the burner and turned on the air. It seemed to start alright. I had it turned down low. I stepped out on deck to urinate and in about 2 or 3 minutes I hear an explosion and I ran back (It had been burning about two minutes before I left). The flames were all around the bottom of the boiler on the floor. I grabbed an old jumper and an old sack and tried to smother it out.

ADRIAN A. WESTALL

In my excitement I didn't notice the fire extinguisher. It made it worse to try to smother it out. The flames soon communicated to other wooden parts of the barge toward the front, i. e. away from the living quarters, and soon the whole barge from the water tank forward was aflame. About 4:30 or 4:45 A.M. the fire department got there and about 9 or 9:30 had the fire under control and left. I left about that time.

I came to work that morning, yesterday, May 21, 1941 about 10 minutes to 4 A.M.

In starting the fire I had on the days previous and intended yesterday to do the same, that is use air pressure to atomize the diesel oil from the 15 gallon drum to start the burner and then after I got up about 40 pounds pressure I turned off the valve that let in the air and diesel oil and turned

(Testimony of Robert P. Kitchen.)

on the steam valve which then forced in the crude oil which was what we operated on. In this instance I hadn't gotten any steam pressure up.

I think the oil line probably ceased temporarily to flow during which time there ceased to be a flame. When the oil came back on the

ADRIAN A. WESTALL

heat caused it to vaporize and spontaneous combustion ignited it. I have had the experience of lighting a boiler or fire box that way—that is—after it had been in use and was turned off while it was still hot I would turn on a small amount of oil—it would smoulder a little and then ignite—That is alright when you are right there to watch it.

In this instance the explosion from the excess oil igniting after it had temporarily stopped flowing blew the excess oil out on to the deck, ignited it and also ignited the oil in the 15 gallon drum of diesel oil. It was not particularly windy.

It was clear weather.

It generally took about 40 minutes to get up the 40 lbs. pressure required to run on the crude oil.

I have fired boilers for the last 15 years. I never worked for Bundensen & Lauritzen before. My pay was $1.10 per hour, double time for overtime, minihum of 2 hours if we don't work, and minimum of ½ day if I work at all. I am 31 and married.

ADRIAN A. WESTALL

(Testimony of Robert P. Kitchen.)

Mr. Darrah: It was taken the next day after the fire, as indicated.

Mr. Tweedt: That is in your handwriting?

Mr. Darrah: Yes; each page, except the signature, and he signed it.

Q. In the deposition there was reference to the —I am just meeting Mr. Tweedt's objection—detailed description of where he was in the toilet: "Q. How far was the toilet from the firebox—Well, I don't mean exactly, but it is less than thirty feet, twenty feet away." It is rather specifically covered in the deposition, so I think we have a right to assume that was the situation, that he went to the toilet and did not urinate on the deck.

Did you notice fire extinguishers aboard the barge? You wouldn't say they weren't there?

A. Pardon?

Q. You woudn't say they weren't there?

A. I did not see them.

Q. Did you notice the fire extinguishers at the side of each door of the engine room?

A. No, sir.

Q. Did you notice the fire extinguishers in the living quarters? [174]

A. No, sir. Just a minute. In the after end in the house, I do know there were none in there.

Q. What?

A. In the after house, because I went back there looking for them during the fire.

(Testimony of Robert P. Kitchen.)

Q. Did you notice them on the deck immediately after the fire? A. No, sir.

Q. Were you there the next day after the fire?

A. Yes, sir.

Q. You didn't think that the bilge pump was intended to put out fires?

A. That was all we had.

Q. Had you started that bilge pump previous to the time of the fire, or caused anyone else to?

A. I am not sure whether it had been running or not.

Q. You said you had to pump it out to keep it afloat. What did you pump it out with?

A. That bilge pump. That is what it was supposed to be pumped out with. There was about four feet of water in the bilges, though, during the fire, so I am not sure whether it was pumped out or not.

Q. You were in a general way in charge of the operation there, were you? A. Yes, sir.

Q. Driving sheet piling? A. Yes, sir.

Q. Did you tell the men what to do?

A. I told the foreman as a rule.

Q. Pardon me?

A. I instructed the foreman what to do as a rule.

Q. There was a foreman on the job?

A. Yes, sir.

Q. He stayed with the barge right along?

A. Stayed with it on his shift.

(Testimony of Robert P. Kitchen.)

Q. But you didn't stay there right along?

A. Not all the time.

Q. There were a number of other men who were on the barge [175] besides the fireman and operator? A. That is right.

Q. They were all working for Bundensen & Lauritzen at the time; is that correct?

A. That is right.

Q. When you said you talked to Ed Foy, you were not talking with this gentleman over here (indicating); it was this gentleman, wasn't it?

A. It was this gentleman and his brother, and I am pretty sure his father with with him.

Q. The conversation you spoke of in your direct examination, was it Mr. Foy, or were you talking to him about it, this gentleman, or was it Ralph?

A. Wel, it was——

Q. You said he would show the men how to operate it.

A. Ralph was the one to do the showing.

Mr. Darrah: That is all.

Redirect Examination

Mr. Tweedt: Q. Mr. Kitchen, at the time you had the Foy No. 1 on this job earlier in May, the men employed by Bundensen & Lauritzen were also on and off the barge carrying out their work?

A. Yes; they were.

Mr. Tweedt: I think that is all.

The Court: That is all. [176]

Mr. Tweedt: If your Honor please, I demanded the production of the insurance policies covering the "Foy No. 2," and they have been produced. These gentlemen tell me they have promised to return them to the underwriters, but I would like to have the policies in evidence.

The Court: Very well.

Mr. Darrah: We have no objection. I think if it gets to a point where we have to have them back, we can stipulate to some way to get them out.

Mr. Tweedt: We can photostat them.

Mr. Darrah: Mr. Tweedt, in order to save the record, as you suggested before, is it going to be necessary that all of this be offered in evidence?

Mr. Tweedt: Of course, these original exhibits will not be written in. They will be part of the record.

The Court: They may be admitted and marked.

(The policies referred to were admitted in evidence and marked, respectively, Respondents' Exhibits H, I, and J.)

Mr. Darrah: Captain Foy, will you take the stand? You have already been sworn.

ED M. FOY,

recalled for libelant in rebuttal, having been previously sworn, testified as follows:

Mr. Darrah: Q. Captain Foy, do you remember a conversation with Mr. Lauritzen on the day

(Testimony of Ed M. Foy.)

you and I went down to the location of the "Derrick Barge No. 2," the day following the fire?

A. Yes; we had a conversation down there.

Q. May 22, 1941; that is the day we took this statement from Mr. Westall? A. Yes. [177]

Q. You were present, were you not, when this was taken? A. Yes.

Q. Now on that day, early in the day, isn't it a fact that we met Mr. Lauritzen?

A. Yes; we couldn't get down, that is, could not drive down, to the barge, oh, nearly a quarter of a mile, I think, and as we came back up there Mr. Lauritzen drove up, and I introduced you to him, and there was a little conversation there in regard to the use of the barge. I don't remember exactly what it was there. It was in regard to the——

Q. Was anything asked about who was on the barge? A. What?

Q. Was anything asked about who was on the barge?

A. Yes; and he told me that—let's see, he said that he knew the man's name, but did not go where he lived. At that time we did not know what burned up the barge, what was the accident, and we was looking for the fireman to find out his version of the fire. He says, "I got him through the union. I think we can get his address through the union." He did not know the man's address. Then we went up the road, I think, to an oil station close to the approach to the Sears Point Bridge, and went in

(Testimony of Ed M. Foy.)
and telephoned, I suppose the union, and got his address; and he said then, he said, "As you told me, you are covered by insurance. How much did you have?" And I said, "$12,000"; and he says, "That is too bad."

Now, I don't know—I can't remember just all the conversation; that was about all there was, and we went immediately to look up Westall, and had to wait until he come home from his day's work after five o'clock to talk to Westall.

Q. At that time did I say anything to Mr. Lauritzen to the effect that he did not have anything to worry about? I will ask you this question: Did Mr. Lauritzen say, "Well, now, Mr. Foy, you told me that this barge was fully covered"; and did I then [178] interrupt and say, "Well, Mr. Foy, our company is insured. You have got nothing to worry about"?

A. I don't remember your saying anything at all up there about it.

Mr. Darrah: That is all.

Mr. Tweedt: No questions.

The Court: Is that the case, gentlemen?

Mr. Darrah: Just one little matter of rebuttal. Mr. Ralph Foy, will you take the stand again?

RALPH LEDINGHAM FOY,

recalled by libelant in rebuttal, having been previously sworn, testified as follows:

Mr. Darrah: Q. Mr. Foy, you heard the testimony of the preceding witness in which he said that in a conversation with you something was suggested that you would have to have a fireman or an operator, and an operator, and he said he would get them for you folks. Was that the conversation, or did he just say they would furnish the crew?

A. They said they would get the operator, but there was no mention of furnishing for us.

Mr. Darrah: That is all.

The Court: Just a moment. You were up there when the barge got up there, were you?

A. Yes, sir.

Q. Who was there at that time?

A. Mr. Kitchen and myself and my brother-in-law, and my brother come in on the barge, and the towboat crew.

Q. You were hazy on your recollection this morning when you testified. I want you now to repeat everything you can recall that anybody said there when that barge arrived.

A. Well, Mr. Kitchen was at the job when the barge—I arrived there before the barge got there. Mr. Kitchen come shortly after, if I remem- [179] ber correctly, and being a mud flat, the tug could not get in to where they were doing the work.

Q. I am trying to get this conversation.

(Testimony of Ralph Ledingham Foy.)

A. Mr. Kitchen and I talked over how we were geing to get the rig in there.

Q. What was said?

A. Well, I suggested the easiest way I thought possible to get the rig in, and Mr. Kitchen agreed, and we run lines——

Q. When you say "agreed," I would like to, and under the rule we must, take the conversation had at that time. It is hard for you to understand, but that is a conclusion that you agreed. You agreed what? I am trying to develop the conversation. I am only using that as an example for the rest of your testimony. Do you follow me?

A. I follow you, but I don't know how to say it.

Q. Well, say it in your own way.

A. I can't exactly remember the exact wording that Mr. Kitchen and I talked about.

Q. Well, as near as you can, or any part of it. That is all I am after. Well, all right, you got the barge in. What happened then?

A. We did not have any crew for it.

Q. Well, wait. You did not have any crew for it. What was said?

A. I told Mr. Kitchen we did not have any crew for the barge, and it was up to them to get the crew for the rig.

Q. Now, what did he say in response to that?

A. He said that he had a rig; I think the rig was

(Testimony of Ralph Ledingham Foy.)

working at Selby; and he could get a fireman to come over to fire the rig.

Q. Where would he get them?

A. Where did he get them? I think they were over at Selby on a rig.

Q. He said they were over on some other rig. Go on. That is not getting from the union, is it?

A. This man was already in their hire. [180]

Q. There is some testimony here that somebody was trying to develop that they got them from the union.

A. They did originally, a couple of weeks before, as I understood.

Q. All right, go on. Tell us what happened.

A. That is the only conversation that I directly remember with Mr. Kitchen.

Q. Is that the first time that he knew that you did not have a crew?

A. That was the first time I had seen him.

Q. Do you know whether that was the first time that he knew? A. I couldn't tell you that.

Q. Was there any other way that he would know?

A. Not unless he found out through Mr. Lauritzen beforehand.

Q. Who was Mr. Lauritzen?

A. Mr. Lauritzen, the owner.

Q. But that is all the conversation you can remember?

A. And the next morning; next morning I was

(Testimony of Ralph Ledingham Foy.)

there and he was there, and I can't remember any direct conversation with him. I can describe what happened and tell you what we did until the time I left.

The Court: Are there any other questions from either side?

Mr. Tweedt: I might ask one additional question, your Honor.

Cross Examination

Mr. Tweedt: Q. Were you aware of the contract for the use of the "Foy No. 2" before you went up there that day?

A. The only thing that I heard, I talked to my father, and he said he had rented the barge, the derrick barge, and to go onto this job at Sears Point, and told me approximately what time it would be in, and I arrived on the job to take care of it.

Q. Were you aware when you were talking to Mr. Kitchen that the charge per hour for the barge included wages of the crew?

A. We had never chartered the barge out before, and that was our working schedule whenever the barge was rented. That was what it [181] was supposed to rent for, and we always had beforehand, had furnished the crew for it. I operated it myself.

Q. Were you aware on this particular occasion that the $10 per hour charge did include wages of the crew?

A. I don't have any recollection of anybody telling me exactly what the barge was rented for.

(Testimony of Ralph Ledingham Foy.)

The Court: That is, the amount?

A. As to the amount.

Mr. Darrah: Q. Did you know that you were not supposed to furnish the crew? A. Yes.

The Court: How did you know that?

A. Because we did not have any crew.

The Court: Who told you you did not have any crew?

A. I am sort of what you might call superintendent. I am sort of in charge of the equipment, myself, and I know whether we got a crew or not.

The Court: All right; step down.

Mr. Darrah: That is all we have.

(Discussion as to arguing or briefing the case.)

The Court: I am going to be frank with you. I can tell you now that you have the laboring oar. I will let you open and close if you want to. Do I make myself clear?

Mr. Darrah: I think so.

The Court: Then we will make it five days, two days, and three days to close. That will be ten days. I am only giving him two days, so he must of necessity anticipate what you are going to say; then I will give you three days to answer. Is that fair?

Mr. Tweedt: That is agreeable to me, your Honor.

The Court: 5, 2, and 3. I will put it over until August 3rd, so it must be submitted at that time.

[182]

Mr. Darrah: May it be stipulated, Mr. Tweedt, that I may have that exhibit?

(Further discussion off the record.)

[Endorsed]: Filed Aug. 11, 1943. [183]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 11th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER THAT DECREE ENTER IN FAVOR OF RESPONDENTS AND THAT THE LIBEL, AS AMENDED, BE DISMISSED, EACH PARTY TO PAY OWN COSTS; ETC.

The above-entitled cause having been heretofore heard and submitted, it is now by the Court ordered that there be entered herein a Decree in favor of respondents and against libelant, and that the libel herein, as amended, be dismissed, upon findings of fact and conclusions of law. The respective parties will pay their own costs. [184]

[Title of District Court and Cause.]

ORDER DISMISSING AMENDED LIBEL

The above entitled cause having been heretofore heard and submitted, it is now by the Court Ordered that there be entered herein a decree in favor of respondents and against libelant, and that the libel herein, as amended, be dismissed, upon findings of fact and conclusions of law. The respective parties will pay their own costs.

Dated: August 11, 1943.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Aug. 11, 1943. [185]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 22nd and 23rd days of July, 1943, before the above entitled court sitting in admiralty, the Honorable Michael J. Roche, United States District Judge, presiding. Messrs. Darrah & Ellis and Messrs. Single, Bryant, Cook & Herrington, by Guard C. Darrah, Esq., and Agler B. Ellis, Esq., appeared as proctors for Libelant, and Messrs. Derby, Sharp, Quinby & Tweedt by James A. Quinby, Esq., and Lloyd M. Tweedt, Esq., appeared as proctors for Respondents. Evidence, both oral

and documentary, [186] having been introduced and the cause submitted for decision, the Court now, after due deliberation thereon and consideration of the briefs and arguments of proctors, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

Libelant is a corporation duly organized and acting under the laws of the State of California. Libelant was at all times herein mentioned the owner of and in possession of the derrick barge "Foy No. 2".

II.

Respondents James R. Bundesen and Howard F. Lauritzen were at all times herein mentioned copartners doing business as general contractors under the firm name and style of Bundesen & Lauritzen.

III.

On the 14th day of May, 1941, Libelant and respondent Bundesen & Lauritzen made and entered into an oral agreement for the services of said derrick barge "Foy No. 2" as follows:

Libelant agreed to furnish to said respondent Bundesen & Lauritzen the services of the derrick barge "Foy No. 2" in connection with the construction of an outfall sewer by said respondent for the United States Navy on the Napa River near Vallejo, California. Libelant agreed to furnish the services of the said barge until the completion of said construction work provided respondent found

that the barge was suitable and capable of performing the contemplated services. Libelant agreed to furnish the services of said barge as aforesaid for the charge of $10.00 per hour of actual use with a minimum charge for four hours on any day the barge was steamed up. [187] Libelant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Libelant stated that the said barge was fully insured and agreed to keep the barge fully insured. Respondent Bundesen & Lauritzen agreed to pay said hourly charge for the services of said barge for each hour of actual use with the minimum charge as aforesaid. Said respondent also agreed to pay the wages of the operator and fireman for any time, after said minimum of four hours, short of eight hours per day, as the operator and fireman had to be paid for a minimum of eight hours on any day they worked. Respondent also agreed to pay libelant for towing the said barge to and from the place of respondent's construction work.

IV.

On the 15th day of May, 1941, Libelant pursuant to said oral agreement as aforesaid, towed said derrick barge from Oakland, California, to the place of respondent's construction work on the Napa River; that thereupon Libelant informed respondent that libelant was unable to furnish its operator and fireman to operate said barge and requested respondent to secure another operator and fireman to

operate the barge for libelant and to deduct the wages of such operator and fireman from the hourly charge for the services of the barge. Respondent, pursuant to libelant's said request, did secure D. E. Williams and Adrian A. Westall to operate said barge as operator and fireman, respectively, for and on behalf of Libelant. Said D. E. Williams and Adrian A. Westall did operate said barge at said place on the 16th, 19th and 20th days of May, 1941, as operator and fireman for and on behalf of libelant. Respondent paid to said D. E. Williams and Adrian A. Westall the amount due to them [188] for their services as operator and fireman on said barge as aforesaid and thereafter deducted as agreed with libelant, the amount so paid to said Williams and Westall from the amount due from respondent to libelant for the services of said barge. Said barge was at all times herein mentioned in the possession of libelant and the operation, maintenance and care of said barge was at all said times under the exclusive control and management of libelant.

V.

On the 21st day of May, 1941, while said fireman Adrian A. Westall was engaged in the process of getting up steam on the boiler of said barge in the usual, customary manner in which said Westall had been directed and instructed by libelant, a fire occurred on said barge; that all damage suffered by said barge while at place of respondent's construction work was due to and caused by said fire; that subsequent to said fire libelant towed said barge

away from the place of respondent's construction work.

While Fireman Westall was engaged in getting up steam on the boiler of the barge as aforesaid, an explosion occurred in the firebox of said boiler which caused fire or burning oil to be thrown from the firebox onto the deck of the barge's fireroom; said fire spread rapidly forward on the barge, causing damage to various parts of the barge and its equipment; that the deck of the fireroom of said barge was covered and caked with oil. Said explosion was due to and caused by the failure of the equipment of the barge to function properly or by reason of defective fuel oil; the fuel line leading to the firebox on said barge was not equipped with a strainer; the damage to said barge was not caused by nor contributed to in whole or [189] in part, by any neglect or lack of care, or any improper act or failure to act, in any respect whatsoever on the part of fireman Westall, or on the part of respondents or any of them; fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish said fire; fireman Westall was at all times herein mentioned a competent, experienced fireman and was not guilty of any neglect or lack of proper care at any time in the performance of his duties as fireman on said barge; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue.

VI.

Shortly after the fire had occurred on said barge, libelant sent to respondents a bill dated May 21, 1941, for the services of the derrick barge on May 16, 19 and 20, 1941. Said bill contained a note stating: "This statement does not release your company from further liability or settlement in connection with loss due to fire." Respondents promptly returned said bill to libelant with a letter dated May 29, 1941, in which respondents asserted that they had no liability by reason of said fire. Libelant took no exception and made no reply to said letter, but libelant did thereupon under date of May 31, 1941, send a bill to respondents for the services of said barge, as aforesaid, and omitted from said bill any claim or reservation of right to claim damages from respondents for injury to said barge. Respondents thereupon paid said bill dated May 31, 1941, and libelant accepted payment thereof.

VII.

Libelant informed respondents at the time the oral agreement for the services of said barge was made that said barge was fully covered by insurance. Libelant did have and [190] kept in force at all times herein mentioned policies of marine insurance on said barge in which said barge was insured and valued for the sum of $12,000.00 against loss or damage by fire and other specified perils. Libelant made claim upon the insurers for loss by reason of the fire occurring on said barge on May 21, 1941, and pursuant to such claim received payment from said insurers of the sum of $12,000.00.

VIII.

The premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

CONCLUSIONS OF LAW

And from the foregoing findings of fact, the Court makes the following conclusions of law:

I.

Libelant is not entitled to recover from respondents, or from any of them.

II.

The libel, as amended, should be dismissed, each party to bear its own costs.

III.

The oral contract between Libelant and Respondent Bundesen & Lauritzen was a contract for the services of the barge "Foy No. 2" and was not a demise of the barge.

IV.

Libelant, by agreeing with respondents to keep said barge fully insured and to include the cost of insurance in the hourly charge for the services of the barge, assumed the risk of loss to said barge by fire and other usual marine risks.

Dated: Sept. 7th, 1943.

MICHAEL J. ROCHE
United States District Judge [191]

Approved as to form, as provided in Rule 22.

.....

Proctors for Libelant

DERBY, SHARP QUINBY
& TWEEDT
Proctors for Respondents

Receipt of a copy of the foregoing proposed Findings of Fact and Conclusions of Law is admitted this 16th day of August, 1943.

SINGLE, BRYANT, COOK
& HERRINGTON
By FRED HERRINGTON
DARRAH & ELLIS
Proctors for Libelant

[Endorsed]: Lodged Aug. 17, 1943. Filed Sep. 7, 1943. [192]

In the Southern Division of the United States District Court for the Northern District of California

In Admiralty—No. 23686-R

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC., a corporation,

Libelant,

vs.

JOHN R. BUNDESEN, HOWARD F. LAURITZEN; BUNDENSEN AND LAURITZEN, et al.,

Respondents.

FINAL DECREE

The above-entitled cause came on regularly for trial on the 22nd and 23rd days of July, 1943, before the above-entitled Court sitting in admiralty, the Honorable Michael J. Roche, United States District Judge, presiding. Messrs. Darrah & Ellis and Messrs. Single, Bryant, Cook & Herrington, by Guard C. Darrah, Esq., and Agler B. Ellis, Esq., appeared as proctors for Libelant, and Messrs. Derby, Sharp, Quinby & Tweedt by James A. Quinby, Esq. and Lloyd M. Tweedt, Esq., appeared as proctors for Respondents. Evidence, both oral and documentary, having been introduced and the cause submitted for decision, [193] and the Court having made and filed herein its findings of fact and conclusions of law, Now, Therefore, it is

Ordered, Adjudged and Decreed that Libelant is not entitled to recover from respondents or from any of them, and it is further

Ordered, Adjudged and Decreed that the libel, as amended, be, and the same is hereby dismissed, each party to pay its own costs.

Dated: Sept. 7th, 1943.

MICHAEL J. ROCHE
United States District Judge

Approved as to form, as provided in Rule 22.

.....

Proctors for Libelant

DERBY, SHARP, QUINBY
& TWEEDT
Proctors for Respondents

(Receipt of Service).

[Endorsed]: Lodged Aug. 17, 1943. Filed Sep. 7, 1943. [194]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 7th day of September, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

No. 23686-R

STOCKTON SAND AND CRUSHED ROCK CO.,

vs.

JOHN R. BUNDENSEN, et al.

FINAL DECREE ENTERED IN FAVOR OF RESPONDENTS, ETC.

In accordance with the findings of fact and conclusions of law this day signed and filed, it is ordered that a final decree be entered in favor of the respondents, in the form this day signed and filed.

[195]

[Title of District Court and Cause.]

LIBELANT'S NOTICE OF APPEAL AND PETITION FOR ALLOWANCE THEREOF

To the Honorable, the Judges of the United States District Court for the Southern Division of the Northern District of California:

The above named libelant, Stockton Sand and Crushed Rock Company, Inc., feeling itself aggrieved by the final decree made and entered herein on or about September 7, 1943, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

Libelant respectfully prays that this appeal be allowed and citation issued as provided by law, and that a duly authenticated transcript of proceedings herein be prepared and sent to said Circuit Court of Appeals as required [196] and provided by law and by the Rules of said Court.

Dated: December 6th, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON
Proctors for Libelant

It is ordered that the appeal herein be allowed as prayed for upon filing cost bond in the sum of $250.00 as required by law.

Dated: December 6th, 1943.

MICHAEL J. ROCHE
Judge of the United States District Court,
Northern District of California

[Endorsed]: Filed Dec. 6, 1943. [197]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The libelant hereby assigns errors in the proceedings, decrees, orders and decisions of the District Court in the above entitled action, as follows:

First: The District Court erred in failing to find that the actual possession, management and control of the Derrick Barge Foy No. 2 was in fact and with respondents at the time of the damage to the Barge on May 21, 1941.

Second: The District Court erred in failing to find that the oral agreement between libelant and respondents entered into on May 14, 1941, was and constituted a demise of the Barge Foy No. 2 from libelant to respondents. [198]

Third: The District Court erred in failing to find that the fireman Adrian Westall was the servant and employee of the respondents, as fireman on the Barge on May 16, 19, 20 and 21, 1941.

Fourth: The District Court erred in failing to find that the fireman Ardian Westall was negligent in starting and operating the boiler on the Barge on May 21, 1941.

Fifth: The District Court erred in failing to find that the negligence of the fireman Adrian Westall resulted in the damage to the Barge.

Sixth: The District Court erred in failing to enter a decree for libelant establishing respondents' liability for the damage to the Barge Foy No. 2.

Seventh: The District Court erred in finding

(I) that the Derrick Barge Foy No. 2 was in the possession of libelant from May 15, 1941, to May 21, 1941, inclusive.

Eighth: The District Court erred in finding (III) that the oral agreement between libelant and respondents was for the services of the Foy No. 2; that libelant agreed to furnish respondent the services of the Foy No. 2; that libelant agreed to furnish and include an operator, fireman and full insurance for the Barge in the hourly charge therefor; that libelant agreed to keep the Barge fully insured.

Ninth: The District Court erred in finding (IV) that after the Barge had been towed to the place of respondents' construction work, libelant informed respondents that libelant was unable to furnish an operator and fireman, and requested respondents to secure an operator and fireman to operate the Barge for libelant, and to deduct their wages from the hourly charge; that respondents did secure D. E. Williams and Adrian Westall to operate, and they did so operate, the Barge for and on behalf of libelant on May 16, 19, and 20, 1941; that on said days the Barge [199] was in the possession of libelant, and the operation, maintenance and care thereof was under the exclusive control and management of libelant.

Tenth: The District Court erred in finding (V) that on May 21, 1941, the fireman Adrian A. Westall got up steam in the usual and customary manner, in which he had been instructed by libelant; that the

deck of the fireroom of the Barge was covered with oil; that an explosion in the firebox was due to and caused by the failure of the equipment of the Barge to function properly or by reason of defective fuel oil; that the damage to the barge was not caused by nor contributed to in whole or in part by any neglect or lack of care, or any improper act or failure to act on the part of fireman Westall, or of the respondents or any of them; that fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish the fire; that fireman Westall was a competent, experienced fireman, and was not guilty of neglect or lack of proper care; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue.

Eleventh: The District Court erred in finding (VI) that after the fire libelant sent to respondents bills dated May 21, 1941, and May 31, 1941, respectively, for the services of the Barge.

Twelfth: The District Court erred in its conclusions of law, No. I, and each and every part thereof.

Thirteenth: The District Court erred in its conclusions of law, No. II, in concluding that the libel as amended should be dismissed.

Fourteenth: The District Court erred in its conclusions of law, No. III, in concluding that the oral contract between libelant and respondents was a contract for the services of, and was not a demise of, the Barge Foy No. 2. [200]

Fifteenth: The District Court erred in its con-

clusion of law, No. IV, in concluding that libelant agreed to keep the Barge fully insured, and to include the cost thereof in the hourly charge for services, and thereby assumed the risk of loss to the Barge by fire and other usual marine risks.

Sixteenth: The decision of the District Court is against law.

Dated: December 6th, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON
Proctors for Appellant

[Endorsed]: Filed Dec. 6, 1943. [201]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Stockton Sand & Crushed Rock Company, Inc., a copartnership, has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain judgment rendered against said Stockton Sand & Crushed Rock Company, Inc., a copartnership in said action in the above entitled court and in favor of Respondents and entered herein on or about September 7th, 1943.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Glens Falls

Indemnity Company, a corporation organized and existing under the laws of the State of New York and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Libelant, that said Libelant will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty Dollars ($250.00), to which amount it acknowledges itself bound.

It is further stipulated on the part of the foregoing bond that in case of a breach of any condition thereof, the above named District Court, may upon ten (10) days' notice to the Surety above named, proceed summarily in said proceedings to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of Two Hundred Fifty Dollars ($250.00).

In Witness Whereof, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney at San Francisco, California, the 2nd day of December, 1943.

GLENS FALLS INDEMNITY COMPANY
By DONALD J. MOLLBERG,
Attorney

[Seal]

The foregoing Bond is hereby approved this 6th day of December, 1943.

MICHAEL J. ROCHE
United States District Judge

(Acknowledgment of Surety)

[Endorsed]: Filed Dec. 6, 1943. [202]

[Title of District Court and Cause.]

LIBELANT'S PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

Sir:

Please prepare Apostles on Appeal in the above entitled Admiralty case in accordance with provisions of law and the Rules of Court, and include therein the following:

1. All pleadings.
2. Transcript of all testimony offered or reviewed in evidence.
3. Deposition of Adrian A. Westall.
4. Libelant's Exhibits—
 1. Bill dated 6/30/41, $637.77, Stockton Sand and Crushed Rock Co. to Bundensen & Lauritzen.
 2. Time card dated May 16, 1941.
 3. Time cards dated May 19, 20 and 21, 1941.
 4. Boiler Safety Order No. 850.
 5. Statement of Fireman Westall. [203]

5. Respondents' Exhibits—
 A.
 B.
 C. (copy as of page 1, Reporter's Transcript)
 D.
 E.
6. Findings of Fact and Conclusions of Law.
7. Final Decree.
8. Notice of Appeal and Petition for Allowance Thereof, together with Allowance of Appeal.
9. Assignment of Errors, Citation on Appeal, Cost Bond, and this Praecipe.

Dated: December 6th, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON
Proctors for Libelant

Receipt of a copy of the foregoing Libelant's Praecipe for Apostles on Appeal is hereby acknowledged this 6th day of December, 1943.

DERBY, SHARP, QUINBY
AND TWEEDT
By (signed) FLOYD M. TWEEDT
Proctors for Respondents

[Endorsed]: Filed Dec. 6, 1943. [204]

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss.

To John R. Bundensen, Howard F. Lauritzen, and Bundensen and Lauritzen, a Co-partnership:

Greetings:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Stockton Sand and Crushed Rock Company, Inc., a corporation, is appellant and you are appellees, to show cause, if any [205] there be, why the decree, order or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, this 6th day of December, 1943.

MICHAEL J. ROCHE
Judge of the United States District Court,
Northern District of California

Receipt of copy of the foregoing Citation is acknowledged this 6th day of December, 1943, to-

gether with copy of Notice of Appeal and Petition for Allowance thereof, Order thereon, Assignment of Errors.

DERBY, SHARP, QUINBY
AND TWEEDT
By LLOYD M. TWEEDT
Proctors for Appellee [206]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that all original Exhibits in the above entitled matter may be transmitted by the Clerk of the United States District Court to the Clerk of the Circuit Court of Appeals, Ninth Circuit, in original form.

Dated: December 11, 1943.

DARRAH AND ELLIS
SINGLE, BRYANT, COOK
AND HERRINGTON
Proctors for Libelant
DERBY, SHARP, QUINBY
& TWEEDT
Proctors for Respondents

It is so ordered.

Dated: December 11th, 1943.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Dec. 11, 1943. [207]

[Title of District Court and Cause.]

RESPONDENTS' COUNTER-PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above-entitled Court, to libelant above named and to its proctors:

Respondents require that the Apostles on Appeal be prepared in accordance with Admiralty Rule No. 5 contained in the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Respondents require the inclusion in said Apostles on Appeal of the following documents in addition to the matters set forth in libelant's Praecipe for Apostles on Appeal:

1. All exhibits offered by respondents and received in evidence. Said exhibits may be transmitted to the Clerk of the Circuit Court of Appeals in and for the Ninth Circuit in original form as heretofore stipulated.

2. All orders of the Court made herein.

3. Libelant's answer to interrogatories propounded by respondents.

4. Answers of respondents to interrogatories attached to libel.

Respondents also demand and require the right to examine the reporter's transcript of proceedings herein and if any errors or omissions therein or therefrom are claimed by respondents, the sub-

mission of said reporter's transcript to the Court for settlement.

Dated: December 15-1943.

DERBY, SHARP, QUINBY
& TWEEDT
Proctors for Respondents

(Receipt of Service)

[Endorsed]: Filed Dec. 16, 1943. [208]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellants may have to and including February 4, 1944, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: January 5, 1944.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Jan. 5, 1944. [209]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the Appellants may have to and including February 18, 1944, to file the Record on Appeal in

the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: February 4, 1944.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Feb. 4, 1944. [210]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 210 pages, numbered from 1 to 210, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Stockton Sand and Crushed Rock Company, Inc., a corporation, Libelant, vs. John R. Bundensen; Howard F. Lauritzen; Bundensen and Lauritzen, x corporation; John Doe and Peter Poe, Respondents, No. 23686-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of Apostles on Appeal is the sum of $34.40 and that the said amount has been paid me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San

Francisco, California, this 14th day of February, A. D. 1944.

C. W. CALBREATH,
Clerk.

[Seal] M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 10687. United States Circuit Court of Appeals for the Ninth Circuit. Stockton Sand and Crushed Rock Company, Inc., Appellant, vs. John R. Bundensen, Howard F. Lauritzen and Bundensen and Lauritzen, a Co-partnership, Appellee. Apostles on Appeal Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 18, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation),

Appellant,

vs.

JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN, a copartnership,

Appellees.

BRIEF FOR APPELLANT.

DARRAH & ELLIS,
GUARD C. DARRAH,
AGLER B. ELLIS,
Stockton Savings & Loan Bank Building, Stockton, California,
SINGLE, BRYANT, COOK AND HERRINGTON,
465 California Street, San Francisco, California,
Proctors for Appellant.

FILED
SEP - 1 1944
PAUL P. O'BRIEN
CLERK

Subject Index

Page

Statement of Jurisdiction 1

Statement of the Case..... 2

Specification of the Assigned Errors Relied Upon..... 6

Argument of the Case..... 6

A. Summary 6

B. Points of law and fact..... 7

1. The contract between the parties was a demise charter and neither the facts nor the law will support the findings and conclusions of the District Court to the contrary..... 7

(a) The derrick barge "Foy No. 2" was without motive power, and therefore the charter was a demise 7

(b) The respondents had possession, control, and management of the barge..... 10

(c) The respondents had direction and control of the operatives of the barge..... 12

2. Respondents were responsible for the damage to the barge "Foy No. 2" and neither the facts nor the law will support the findings and conclusions of the District Court to the contrary..... 15

(a) When respondents returned the barge in a damaged condition, responsibility for the damage was prima facie established against them..... 15

(b) The fire which damaged the barge was proximately caused by negligence of the barge fireman, and respondents were responsible for his negligence under the doctrine of respondeat superior 16

3. The fire which damaged the barge was not proximately caused by unseaworthiness of the barge or its equipment and neither the facts nor the law will support the findings and conclusions of the District Court to the contrary..... 23

Page

4. Libelant did not waive its claim for damages by accepting payment for the use of the barge and neither the facts nor the law will support the findings and conclusions of the District Court to the contrary.... 25

5. Libelant was not estopped from asserting a claim for damages by carrying and collecting insurance and neither the facts nor the law will support the findings and conclusions of the District Court to the contrary 27

6. The appellant is entitled to a trial de novo..... 31

Conclusion 32

Table of Authorities Cited

Cases

	Pages
Frank Waterhouse v. Rock Island Alaska Min. Co., C.C.A. Wash. 1899, 97 F. 466	25
Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417	8, 9, 16, 26
Kennelly v. Frederick Starr Contracting Co., C.C.A.N.Y. 1918, 250 F. 229	29
O'Boyle v. McGirr Bros., D.C.N.Y. 1930, 39 F. 2d 637	8
Seminole Lumber & Export Co. v. Bronx Barge Corp., D.C.Fla. 1926, 11 F. 2d 982	24
The Ernest H. Meyer, C.C.A.Cal. 1936, 84 F. 2d 496	31
The Independent, C.C.A.La. 1941, 122 F. 2d 141	8
The Indrapura, C.C.A.Ore. 1911, 190 F. 711	24
The Jungshoved, D.C.N.Y. 1921, 272 F. 122	24
The Moran No. 10, D.C.N.Y. 1924, 41 F. 2d 255	9, 15, 26
The Portaritisa, C.C.A.Fla. 1942, 131 F. 2d 362	31
The Turret Crown, C.C.A.N.Y. 1924, 297 F. 766	29
The Wildwood, C.C.A.Wash. 1943, 133 F. 2d 765	31
The Willie, C.C.A.N.Y. 1916, 231 F. 865	8
United States v. Cornell Steamboat Co., 267 U.S. 281, 45 S.Ct. 239, 60 L.Ed. 613	9
United States v. Shea, 152 U.S. 178, 14 S. Ct. 519, 38 L.Ed. 403	8, 9, 26
White v. Upper Hudson Stone Co., C.C.A.N.Y. 1917, 248 F. 893	29

Codes

Judicial Code, Section 128	2
28 U.S.C.A., Section 225	2
28 U.S.C.A., Section 41 (3)	2

No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation), *Appellant,*
VS.
JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN, a copartnership, *Appellees.*

BRIEF FOR APPELLANT.

The appeal is by the libelant from a final decree of the District Court of the United States for the Northern District of California, Southern Division.

STATEMENT OF JURISDICTION.

The cause was in admiralty, and by the libel (Ap. 2-8) and amendment (Ap. 20-21) the libelant sought to recover damages because the respondents returned in a damaged condition (Ap. 5.) a commercial vessel of the United States, to wit, a derrick barge (Ap. 2-3) which they had chartered from the libelant (Ap.

3-4). The admiralty and maritime jurisdiction of the district court was alleged in the libel (Ap. 5), admitted in the answer (Ap. 26), and found true by the district court (Ap. 231). The district court therefore had jurisdiction of the libel. 28 U.S.C.A., sec. 41 (3). The final decree dismissing the libel was entered September 7, 1943. (Ap. 233-234.) Petition for allowance of appeal to this court and order allowing the appeal were filed December 6, 1943. (Ap. 235.) This court therefore has jurisdiction upon appeal to review the said decree under section 128 of the Judicial Code. 28 U.S.C.A., sec. 225.

STATEMENT OF THE CASE.

Libelant was a corporation (Ap. 2, 226) and the owner of the derrick barge "Foy No. 2" (Ap. 2-3). The barge was without motive power, but the equipment thereon was operated by steam. Respondents Bundesen and Lauritzen were copartners and general contractors. (Ap. 226.) In May, 1941, they were constructing an outfall sewer for the United States Navy on the Napa River, near Vallejo, California. (Ap. 226.) In connection with such work they chartered the "Foy No. 2" from libelant. (Ap. 226.) The contract between the parties was oral and informal. (Ap. 226.) According to the allegations of the libel the contract was a demise charter. (Ap. 3-4.) According to the allegations of the answer to the libel (Ap. 24-26), and the findings (Ap. 226-227) and conclusions of the court (Ap. 231), the contract was a time charter for the services of the barge.

The first question involved on the appeal, raised by the pleadings, the evidence, and the findings and conclusions of the court, is whether the contract between the parties was a demise charter or a time charter.

On May 15, 1941, the barge was towed from Oakland, California, to the said place of respondents' construction on the Napa River. (Ap. 227.) There it was operated on May 16, 19, and 20. (Ap. 228.) Early in the morning of May 21, 1941, while the fireman Adrian A. Westall was getting up steam in the boiler on said barge, a fire occurred (Ap. 228) and the barge was damaged.

In the first cause of action in the libel, it was alleged that under the demise charter respondents had custody and possession of the barge and controlled and directed the operation thereof and the operatives thereon (Ap. 4); that the barge had a value of $40,000 when delivered to respondents but had been damaged to the extent of $39,500 when returned by them to libelant (Ap. 4-5). In the second cause of action in the libel, it was alleged that the damage was ascribable to the negligence of the respondents. (Ap. 5-6.) The answer to the libel alleged (Ap. 29), and the court found it true (Ap. 228), that the barge was at all times in the possession of the libelant, and the operation, maintenance, and care thereof was at all times under the exclusive control and management of the libelant. The answer also denied the allegations of negligence (Ap. 27), and the court found in favor of the denials (Ap. 229).

The second question involved on the appeal, raised by the pleadings, the evidence, and the findings, is whether respondents were responsible for the damage to the barge.

Several affirmative defenses were raised by the answer to the libel. One of the affirmative defenses was that libelant warranted that the barge was seaworthy; that the warranty was breached; and that unseaworthiness of the equipment of the barge caused the fire. (Ap. 31-32.) The court inferentially found in favor of the defense. (Ap. 229.)

The third question involved on the appeal, raised by the pleadings, the evidence, and the findings, is whether breach of a warranty of seaworthiness caused the fire.

Another of the affirmative defenses was that libelant had waived any claim or cause of action for damages to said barge from fire or other cause, by accepting payment for the use of the barge. (Ap. 33.) The court inferentially found in favor of the defense. (Ap. 230.)

The fourth question involved on the appeal, raised by the pleadings, the evidence, and the findings is whether libelant waived its claim for damages.

A further affirmative defense was that libelant carried insurance inuring to the benefit of respondents, had received payment from the insurer for loss or damage to the barge, and was thereby estopped from claiming or recovering damages from respondents. (Ap. 30-31.) The findings of the court were

favorable to the defense. (Ap. 230.) The court also concluded that by reason of such insurance the libelant "assumed the risk of loss to said barge by fire". (Ap. 231.)

The fifth question involved on the appeal, raised by the pleadings, the evidence, and the findings and conclusions of law, is whether libelant is debarred from asserting a claim for damages against the respondents because it carried insurance and received payment from the insurer.

At the trial, the issue of damages was reserved pending determination by the court of the issue of liability. By its findings of fact and conclusions of law the issue of liability was determined against the libelant (Ap. 225-231); and a final decree was entered on September 7, 1943, decreeing that libelant take nothing and that the libel be dismissed (Ap. 223).

Under familiar principles the appeal being in admiralty the appellant is entitled to a trial de novo, respect, of course, being accorded to the findings of the district court. As the court will notice, part of the evidence before the district court consisted in the deposition of the fireman Adrian A. Westall who was alone on the barge at the time of the fire. (Ap. 43-76.) A written statement given by Westall the day after the fire was also admitted in evidence. (Ap. 210-212.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Appellant relies upon its assigned errors Nos. 1 to 16, inclusive. (Ap. 236-239.)

ARGUMENT OF THE CASE.

A. SUMMARY.

The contract between libelant and respondents was a demise charter. It was binding although oral and informal. As charterers of the barge the respondents were charged with the duty of paying hire for the use of the barge. They were also charged with the duty of safeguarding the barge during the charter period. They had possession, control, and management of the barge, and direction and control over the operatives. When they returned the barge in a damaged condition, responsibility for the damage was prima facie established against them. The burden then rested on respondents to exonerate themselves from fault. They did not sustain that burden. If the fire which damaged the barge was proximately caused by negligence of the barge fireman, respondents were responsible under the doctrine of *respondeat superior*. The fire was not proximately caused by unseaworthiness of the barge or its equipment. Libelant did not waive its claim for damages by accepting payment for the use of the barge. Nor was libelant estopped from asserting a claim for damages by carrying and collecting insurance. The findings

of fact are contrary to the evidence. The conclusions of law are erroneous. Therefore, the judgment for respondents should be reversed.

B. POINTS OF LAW AND FACT.

1. THE CONTRACT BETWEEN THE PARTIES WAS A DEMISE CHARTER AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

This point is covered by assignments of error Nos. 1 (Ap. 236), 2 (Ap. 236), 3 (Ap. 236), 7 (Ap. 236-7), 8 (Ap. 237), 9 (Ap. 237), and 14 (Ap. 238). Each will be printed in full before the argument addressed to it.

(a) The derrick barge "Foy No. 2" was without motive power, and therefore the charter was a demise.

Assignment of Error No. 2. (Ap. 236.) The District Court erred in failing to find that the oral agreement between libelant and respondents entered into on May 14, 1941, was and constituted a demise of the Barge Foy No. 2 from libelant to respondents.

Assignment of Error No. 8. (Ap. 237.) The District Court erred in finding (III) that the oral agreement between libelant and respondents was for the services of the Foy No. 2; that libelant agreed to furnish and include an operator, fireman and full insurance for the Barge in the hourly charge therefor; that libelant agreed to keep the Barge fully insured.

Assignment of Error No. 14. (Ap. 238.) The District Court erred in its conclusion of law, No. III, in concluding that the oral contract between libelant and respondents was a contract for the services of, and was not a demise of, the Barge Foy No. 2.

The law is thoroughly settled that a charter of a barge without motive power is a demise, and this is true although the barge is accompanied by bargees paid by the owner.

United States v. Shea, 152 U.S. 178, 14 S. Ct. 519, 522-3, 38 L.Ed. 403.

The Independent, C.C.A.La. 1941, 122 F. 2d 141, 143.

Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417, 418.

O'Boyle v. McGirr Bros., D.C.N.Y. 1930, 39 F. 2d 637, 638.

The Willie, C.C.A.N.Y. 1916, 231 F. 865, 867.

In *Ira S. Bushey & Sons v. W. E. Hedger & Co.,* 40 F. 2d 417, it was said, at page 418:

"Charters of barges without motive power, accompanied by a bargee paid by the owner, are demises. The Daniel Burns (D.C.) 52 F. 159; Monk v. Cornell Steamboat Co. (C.C.A.) 198 F. 472; The Willie (C.C.A.) 231 F. 865; Hastorf v. Long (C.C.A.) 239 F. 852; Warley v. Carroll (C.C.A.) 248 F. 466. * * * Both kinds are without motive power and are essentially subject to the control of the tugs which tow them. The agreements by which they are chartered are

demises. Legally such vessels are regarded as in the exclusive possession of the charterer."

The binding effect of a demise charter is not impaired by the fact, as in this case (Ap. 236), that it is informal or oral.

United States v. Cornell Steamboat Co., 267 U.S. 281, 285, 45 S.Ct. 239, 60 L.Ed. 613.

United States v. Shea, 152 U.S. 178, 14 S.Ct. 519, 522, 38 L.Ed. 403.

Under such demises the charterer is charged with the duty of paying the hire for the use of the vessel.

United States v. Shea, 152 U.S. 178, 14 C.Ct. 519, 522, 38 L.Ed. 403.

And under such demise the charterer is also charged with the duty of safeguarding the vessel.

The Moran No. 10, D.C.N.Y. 1924, 41 F. 2d 255, 256.

Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417, 418.

As the barge "Foy No. 2" was without motive power, and, as the court found (Ap. 227), had to be towed to and from the place where respondents used it, it follows that the district court erred in failing to find that the charter was a demise, in finding that the charter was for the services of the barge (Ap. 227), and in concluding that the charter was not a demise (Ap. 231).

(b) The respondents had possession, control, and management of the barge.

Assignment of Error No. 1. (Ap. 236.) The District Court erred in failing to find that the actual possession, management and control of the Derrick Barge Foy No. 2 was in fact and with respondents at the time of the damage to the Barge on May 21, 1941.

Assignment of Error No. 7. (Ap. 236-237.) The District Court erred in finding (I) that the Derrick Barge Foy No. 2 was in the possession of libelant from May 15, 1941, to May 21, 1941, inclusive.

Assignment of Error No. 9. (Ap. 237.) The District Court erred in finding (IV) that after the Barge had been towed to the place of respondents' construction work, libelant informed respondents that libelant was unable to furnish an operator and fireman, and requested respondents to secure an operator and fireman to operate the Barge for libelant, and to deduct their wages from the hourly charge; that respondents did secure D.E.Williams and Adrian Westall to operate, and they did so operate, the Barge for and on behalf of libelant on May 16, 19, and 20, 1941; that on said days the barge was in the possession of libelant, and the operation, maintenance and care thereof was under the exclusive control and management of libelant.

The fact that the barge was without motive power should have prompted a finding that respondents had

possession, management, control, and care thereof at the time of the fire. The error of the court in finding to the contrary is therefore obvious as a matter of law. But the findings of the court in that respect were not only against law, but they were contrary to the evidence.

While the parties did not agree at the trial as to all the terms of the oral contract made over the telephone between Ed. M. Foy, on behalf of the libelant, and Howard F. Lauritzen, on behalf of the respondents, they did agree as to some of the terms. Thus there was no disagreement as to the rate of hire or how the rate was to be computed. Both Foy (Ap. 84-85) and Lauritzen (Ap. 170) testified that the rate was to be $80 a day, that is, $10 an hour, when the barge was in actual use by the respondents, and with a minimum of $40 whenever the barge was "fired up".

This agreement as to rate and computation of rate necessarily vested in respondents complete dominion over the barge. They alone had the power to say whether the barge would work or remain idle. They alone had the power to say where the barge would work and how long it would work. They alone had the power to say whether the operatives of the barge would or would not work, where they would work, and how long they would work.

That respondents were vested with complete dominion over the barge is further demonstrated by the acts and conduct of the parties under the charter. It appears from the record without dispute that

Robert Kitchen, construction superintendent for respondents (Ap. 197), directed when the barge was to leave for the construction job and where it was to be placed or moored at the job (Ap. 197-198). Without consulting libelant, he overhauled the barge equipment. (Ap. 202.) This consumed the time of six men for three hours. (Ap. 188.) Respondents paid libelant for use of the barge during the time thus consumed. (Ap. 93-94.) Respondents kept a foreman on board the barge "to tell the men what to do". (Ap. 214.) There were a number of other men on the barge besides the fireman and operator. (Ap. 215.) All were working for respondents. (Ap. 215.)

The evidence, in other words, is irreconcilable with a conclusion that libelant was in possession of the barge. The court erred in so finding. (Ap. 236, 237.) The inevitable finding should have been that respondents had possession, control, and management of the barge.

(c) The respondents had direction and control of the operatives of the barge.

Assignment of Error No. 3. (Ap. 236.) The District Court erred in failing to find that the fireman Adrian Westall was the servant and employee of the respondents, as fireman on the Barge on May 16, 19, 20 and 21, 1941.

Assignment of Error No. 9. (Ap. 237.) The District Court erred in finding (IV) that after the Barge had been towed to the place of re-

spondents' construction work, libelant informed respondents that libelant was unable to furnish an operator and fireman, and requested respondents to secure an operator and fireman to operate the Barge for libelant, and to deduct their wages from the hourly charge; that respondents did secure D. E. Williams and Adrian Westall to operate, and they did so operate, the Barge for and on behalf of libelant on May 16, 19, and 20, 1941; that on said days the Barge was in the possession of libelant, and the operation, maintenance and care thereof was under the exclusive control and management of libelant.

As pointed out in an earlier part of this brief, a charter of a barge without motive power, although accompanied by bargees, is a demise. Consequently, the fact that libelant secured the operative (Williams) and the fireman (Westall) would not be decisive in the present case.

When the record is examined, however, it becomes certain that respondents had the direction and control of both said operatives. Both, according to the record, were in the employ of respondents at the time the barge was moved to the construction job and both were transferred to the barge by respondents. (Ap. 172.)

Respondents did not produce operator Williams at the trial of the action nor did they produce fireman Westall. But the testimony of fireman Westall was taken by deposition at the instance of libelant.

(Ap. 42-77.) It was supplemented by a written statement which he gave on May 22, 1941, the day after the fire. (Ap. 210-212.) The testimony of Westall is disinterested and convincing. He said he was working for respondents at the time of the fire. (Ap. 43.) He said "they were my bosses". (Ap. 44.) He said they gave him instructions as to when to come and fire the boiler and when to quit. (Ap. 45.) He said they paid him. (Ap. 45.) He said they deducted Social Security from his pay. (Ap. 46.) There can be no escape from the testimony of fireman Westall; it demonstrates beyond any doubt that he was under the direction and control of respondents and nobody else at the time of the fire.

There is, therefore, no basis in the record for the finding of the court that Williams and Westall operated the barge for and on behalf of libelant. (Ap. 228.) It was error for the court to make such finding. It was likewise error for the court to fail to find that Westall was the servant and employee of respondents.

From the foregoing considerations it necessarily follows that the contract between the parties was a demise charter with all the legal consequences flowing therefrom.

2. RESPONDENTS WERE RESPONSIBLE FOR THE DAMAGE TO THE BARGE "FOY NO. 2" AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

This point is covered by assignments of error Nos. 3 (Ap. 236), 4 (Ap. 236), 5 (Ap. 236), 6 (Ap. 236), 10 (Ap. 237-238), and 12 (Ap. 238). Each will be printed in full before the argument addressed to it.

(a) When respondents returned the barge in a damaged condition, responsibility for the damage was prima facie established against them.

Assignment of Error No. 6. (Ap. 236.) The District Court erred in failing to enter a decree for libelant establishing respondents' liability for the damage to the Barge Foy No. 2.

The pertinent law is contained in *The Moran No. 10,* D.S.N.Y. 1924, 41 F. 2d 255, where it was said, at page 256:

> "The law on the subject is well settled. The charterer is liable for any damages to the boat resulting from his own negligence or the negligence of any one to whom he entrusts her. The burden of proving negligence is upon the owner, but he makes out a prima facie case if he can go no further than to show that the boat was damaged during the charter period and then the burden of explanation, or as it is sometimes said, of carrying on, lies upon the charterer. In the absence of exculpatory evidence, a presumption of negligence arises against him. (Cases cited.) This is the established law as to the obligation of the bailee in bailment for hire. (Cases cited.)"

The same principles were declared in *Ira S. Bushey & Sons v. W. E. Hedger & Co.,* C.C.A.N.Y. 1930, 40 F. 2d 417, where it was said, at page 418:

> "The agreements by which they are chartered are demises. Legally such vessels (barges without motive power) are regarded as in the exclusive possession of the charterer. In such a relation the charterer is only liable for negligence. But, when the barge is injured while in the exclusive possession of a bailee, the latter has the duty of going forward with evidence to explain the cause of the damage and to show that it was due to no lack of care on his part. (Cases cited.)"

Since, as later will be shown, the respondents did not sustain the burden of exonerating themselves from fault, it follows that the District Court erred in failing to enter a decree for libelant establishing respondents' liability for the damage to the Barge Foy No. 2.

(b) The fire which damaged the barge was proximately caused by negligence of the barge fireman, and respondents were responsible for his negligence under the doctrine of respondeat superior.

Assignment of Error No. 3. (Ap. 236.) The District Court erred in failing to find that the fireman Adrian Westall was the servant and employee of the respondents, as fireman on the Barge on May 16, 19, 20 and 21, 1941.

Assignment of Error No. 4. (Ap. 236.) The District Court erred in failing to find that the fireman Adrian Westall was negligent in starting

and operating the boiler on the Barge on May 21, 1941.

Assignment of Error No. 5. (Ap. 236.) The District Court erred in failing to find that the negligence of the fireman Adrian Westall resulted in the damage to the Barge.

Assignment of Error No. 10. (Ap. 237-238.) The District Court erred in finding (V) that on May 21, 1941, the fireman Adrian A. Westall got up steam in the usual and customary manner, in which he had been instructed by libelant; that the deck of the fireroom of the Barge was covered with oil; that an explosion in the firebox was due to and caused by the failure of the equipment of the Barge to function properly or by reason of defective fuel oil; that the damage to the barge was not caused by nor contributed to in whole or in part by any neglect or lack of care, or any improper act or failure to act on the part of fireman Westall, or of the respondents or any of them; that fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish the fire; that fireman Westall was a competent, experienced fireman, and was not guilty of neglect or lack of proper care; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue.

Assignment of Error No. 12. (Ap. 238.) The District Court erred in its conclusion of law, No. I, and each and every part thereof.

Paragraphs XII and XIII of the libel, referred to in Assignment of Error No. 10 (Ap. 237-238), were as follows:

"XII. Libelant is informed and believes and thereupon alleges that respondents and each of them so carelessly and negligently used, cared for, and mishandled said barge 'Foy 2', and so failed to take proper care of said barge 'Foy 2' that therein and thereby said 'Foy 2' has been badly damaged by fire; that the reasonable cost of repairing said 'Foy 2' is the sum of $39,500.00, all to libelant's damage in the sum of $39,500.00." (Ap. 5.)

"XIII. Libelant is informed and believes, and thereupon alleges, that respondents were negligent in the aforesaid matters and things in the following particulars (among others which will be shown at the trial of this cause, and in which particulars libelant prays that this libel may be amended and supplemented):

(a) Starting a fire in the firebox without properly inspecting the condition thereof and also without leaving an attendant to watch said fire, but on the contrary in deliberately leaving said fire entirely unattended after starting the same.

(b) Thereafter, hearing a noise of a suspicious nature in the manner of the puff of a small explosion of fire, in not ascertaining the cause of said noise or fire, or sending any attendant to said noise immediately.

(c) In later taking improper measures to arrest and prevent the spread of said fire and particularly, entirely neglecting to use any fire extinguisher for said purpose.

(d) In not sufficiently manning said 'Foy 2' with careful, prudent and capable men and crew.

(e) In ordering or permitting the fire to be thus separated in said 'Foy 2' with only one employee aboard, and particularly when that one employee did not remain in constant attendance at the fire during such periods as lighting the fire.

(f) In failing to properly care for said 'Foy 2' and particularly to guard her against fire." (Ap. 5-6.)

Conclusion of Law No. I, referred to in Assignment of Error No. 12, was as follows:

"I. Libelant is not entitled to recover from respondents, or from any of them." (Ap. 231.)

The demonstration was earlier made that fireman Westall was the servant and employee of respondents at the time of the fire. The error of the court in finding the contrary has likewise been earlier demonstrated. Accordingly, Assignment of Error No. 3 need not again be discussed. If, therefore, fireman Westall was negligent and such negligence proximately caused the fire which damaged the barge, it is clear that respondents are liable under the doctrine of *respondeat superior.*

The questions here to be discussed are these: Was fireman Westall negligent, and did that negligence proximately cause the fire which damaged the barge?

Whatever else may be said, it is clear upon the present record that while fireman Westall was get-

ting up steam in the boiler room he negligently left the fire therein unattended and that his negligence in such respect proximately caused the damage to the barge. To that extent, therefore, the district court erred in its findings and conclusions.

The evidence on the subject is all one way. Westall who was alone on the barge at the time of the fire, testified in his deposition as follows:

> "Q. Now, tell us what happened on the 21st of May, 1941?
>
> A. Well, on the 21st day of May, 1941, I went up to fire the boiler, and had gotten up a reasonable amount of speed; I had got the firing well under way, and was subjected to a call to the toilet, and I left for four or five minutes, and when I come back it was well, I would call it, it must have been combustion fire that started the fire that burnt up the boiler." (Ap. 47.)

> "Q. Then go ahead and tell us just what happened?
>
> A. Well, after I had the air atomizing the fuel, and it looked like it was well taking care of itself, I stepped out at the stern end of the barge to go to the toilet, and on my way back I heard this explosion, and immediately I proceeded back to where it was, to see what had happened.
>
> Q. And what did you find?
>
> A. Well, I found that the deck in front of the fire box was on fire. And I immediately tried to extinguish the fire, looking around for something to put it out with, and I didn't find it. I used a pair of overalls and jumper that I had myself, to try to beat it out with." (Ap. 49.)

"Q. And it's better practice not to leave it while it is generating?

A. Yes, that's correct. Sometimes those things can't be avoided.

Q. You could have turned it off, couldn't you, before you left?

A. Well, I could have, I guess." (Ap. 55.)

"Q. At the time you went to the toilet, you were satisfied from the manner of operating that it was operating satisfactorily, weren't you?

A. Yes, sir.

Q. Now, at the time that you heard this explosion that you referred to, you were on your way back from the toilet, weren't you?

A. Yes.

Q. How far was the toilet from the fire box?

A. Well, I couldn't say just how far it was.

Q. Well, I don't mean exactly, but it's less than 30 feet, or 20 feet or so?

A. It's around 30 feet, I think, from the fire box.

Q. And when you heard the explosion, what did you do?

A. Well, I immediately went back to see what the trouble was. I went back to the fire box, to see what had happened.

Q. How long were you gone, Mr. Westall?

A. I had gone several minutes, anyhow. I don't know just how long it was." (Ap. 60.)

"Q. When you went around to the toilet, there was a big water tank that sits on there about eight feet high, and pretty nearly across the whole deck, and is between you and the fire box at that time, is that correct?

A. That's correct." (Ap. 73.)

There was introduced in evidence at the trial a Safety Order of the Industrial Accident Commission of the State of California. It reads:

> "No boiler while in active service shall be left unattended, regardless of whether or not it is equipped with automatic water feed regulator, fuel and damper regulators, high and low water alarm, or any form of automatic control. By 'active service' is meant that portion of time when the main stop valve is open and the fires are burning." (Ap. 176, 207.)

That Westall violated this Safety Order, is not susceptible to doubt. Nor is it susceptible to doubt that such violation was negligence. In answer to a hypothetical question covering the situation to which Westall testified, Thomas W. Smith, a chief engineer, said that due care was not used because the fireman did not stay close to the fire while generating steam. (Ap. 112-113.) Henry Foss, an operating engineer, gave similiar testimony. (Ap. 118-119.) When asked if it was good practice to leave the fireroom while steam was being generated, respondents' superintendent of construction Kitchen replied, *"Not as long as you are in sight of the stack and close enough or within sight"*. (Ap. 208-209.)

That such negligence on the part of Westall proximately caused the fire which damaged the barge, cannot be debated. The record therefore leads unerringly to the conclusion that the district court erred in finding that Westall was not the servant and employee of respondents, in finding that Westall was not negligent, in finding that negligence of Westall

did not proximately cause the fire, and in concluding that libelant was not entitled to recover from respondents.

3. THE FIRE WHICH DAMAGED THE BARGE WAS NOT PROXIMATELY CAUSED BY UNSEAWORTHINESS OF THE BARGE OR ITS EQUIPMENT AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

Assignment of Error No. 10. (Ap. 237-238.) The District Court erred in finding (V) that on May 21, 1941, the fireman Adrian A. Westall got up steam in the usual and customary manner, in which he had been instructed by libelant; that the deck of the fireroom of the Barge was covered with oil; *that an explosion in the firebox was due to and caused by the failure of the equipment of the Barge to function properly or by reason of defective fuel oil;* that the damage to the barge was not caused by nor contributed to by any neglect or lack of care on the part of fireman Westall, or of the respondents or any of them; that fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish the fire; that fireman Westall was a competent, experienced fireman, and was not guilty of neglect or lack of proper care; that each and every allegation in paragraphs XII and XIII of the libel herein is untrue." (Italics added.)

In their answer, the respondents asserted the defense "that the fire which caused said damage on May

21, 1941, was due to and caused by unseaworthiness of the equipment of said barge". (Ap. 31-32.) It is obvious that the district court did not make a direct finding according to the language of the defense. The italicized part of the above assignment has reference to a finding in the language of the assignment. (Ap. 229.) Possibly, respondents may regard such finding as an inferential finding sustaining their defense of unseaworthiness. *This court will notice, however, that the district court did not find what particular equipment of the barge failed to function properly or in what respect the fuel oil was defective.*

The presumption of seaworthiness arises in all cases of charter, and the burden of showing unseaworthiness is upon the one asserting it.

> *Seminole Lumber & Export Co. v. Bronx Barge Corp.,* D.C.Fla. 1926, 11 F. 2d 982, 983.

Seaworthiness does not require perfection in equipment. All that is required is reasonable fitness for the services designed or required.

> *The Indrapura,* C.C.A.Ore. 1911, 190 F. 711, 714.

In the case of a demise, the charterer takes *caveat emptor* as to defects which are open, if the charterer has had an opportunity to examine the vessel.

> *The Jungshoved,* D.C.N.Y. 1921, 272 F. 122, 124.

Here the respondents not only had full opportunity to examine the barge but they operated it for three days before the fire. They made no demands upon

the libelant for other or further equipment. This must be deemed a waiver of the lack of function or existence of defects, italicized in the above assignment.

Frank Waterhouse v. Rock Island Alaska Min. Co., C.C.A.Wash. 1899, 97 F. 466, 476.

Manifestly, the decree of the court cannot be sustained upon the theory that unseaworthiness of the equipment of the barge proximately caused the fire which damaged the barge.

4. LIBELANT DID NOT WAIVE ITS CLAIM FOR DAMAGES BY ACCEPTING PAYMENT FOR THE USE OF THE BARGE AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

Assignment of Error No. 13. (Ap. 238.) The District Court erred in its conclusion of law, No. II, in concluding that the libel as amended should be dismissed.

Another defense asserted in the answer was that libelant had waived its claim for damages by accepting payment for the use of the barge. (Ap. 33.) Responsive to the defense, the district court made this finding:

> "VI. Shortly after the fire had occurred on said barge, libelant sent to respondents a bill dated May 21, 1941, for the services of the derrick barge on May 16, 19 and 20, 1941. Said bill contained a note stating: 'This statement does not

release your company from further liability or settlement in connection with loss due to fire.' Respondents promptly returned said bill to libelant with a letter dated May 29, 1941, in which respondents asserted that they had no liability by reason of said fire. Libelant took no exception and made no reply to said letter, but libelant did thereupon under date of May 31, 1941, send a bill to respondents for the services of said barge, as aforesaid, and omitted from said bill any claim or reservation of right to claim damages from respondents for injury to said barge. Respondents thereupon paid said bill dated May 31, 1941, and libelant accepted payment thereof." (Ap. 230.)

As pointed out in an earlier part of this brief the respondents as charterers of the barge were charged with the duty of paying the stipulated hire for its use.

United States v. Shea, 152 U.S. 178, 14 S.Ct. 519, 522, 28 L.Ed. 403.

Another, and wholly independent duty, with which they were charged as charterers of the barge, was to safeguard it or respond in damages.

The Moran No. 10, D.C.N.Y. 1924, 41 F. 2d 255, 256.

Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y. 1930, 40 F. 2d 417, 418.

There was no dispute between the parties as to the amount of the bill for the barge hire. When respondents paid that bill they merely discharged one of their duties. Logic will not permit it to be said that they

thereby discharged all other independent duties and particularly the duty to respond in damages if they did not safeguard the barge. Appellant does not conceive that this court will reach a contrary conclusion.

If, therefore, it be assumed that Conclusion of Law No. II that the action be dismissed (Ap. 231) is based upon an implied finding of waiver arising out of the facts recited in Finding No. VI (Ap. 230), it must inevitably follow that the said conclusion is not supported by the said finding.

5. LIBELANT WAS NOT ESTOPPED FROM ASSERTING A CLAIM FOR DAMAGES BY CARRYING AND COLLECTING INSURANCE AND NEITHER THE FACTS NOR THE LAW WILL SUPPORT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT TO THE CONTRARY.

Assignment of Error No. 8. (Ap. 237.) The District Court erred in finding (III) that the oral agreement between libelant and respondents was for the services of the Foy No. 2; that libelants agreed to furnish respondent the services of the Foy No. 2; *that libelant agreed to furnish and include* an operator, fireman and *full insurance for the Barge in the hourly charge therefor; that libelant agreed to keep the Barge fully insured.* (Italics added.)

Assignment of Error No. 15. (Ap. 238-239.) The District Court erred in its conclusion of law, No. IV, in concluding that libelant agreed to keep the Barge fully insured, and to include the cost thereof in the hourly charge for services, and

thereby assumed the risk of loss to the Barge by fire and other usual marine risks.

The defense was also asserted in the answer that libelant agreed "to keep said barge fully insured for the benefit of libelant and said respondents" (Ap. 30), and that because libelant carried and collected insurance it was "estopped to claim or recover any damages suffered by said barge as the result of said fire on May 21, 1941" (Ap. 31).

Responsive to this defense, the district court made Finding No. VII, as follows:

> "Libelant informed respondents at the time the oral agreement for the services of said barge was made that said barge was fully covered by insurance. Libelant did have and kept in force at all times herein mentioned policies of marine insurance on said barge in which said barge was insured and valued for the sum of $12,000.00 against loss or damage by fire and other specified perils. Libelant made claim upon the insurers for loss by reason of the fire occurring on said barge on May 21, 1941, and pursuant to such claim received payment from said insurers of the sum of $12,000.00." (Ap. 230.)

And responsive to the said finding, the court made Conclusion of Law No. IV, as follows:

> "Libelant by agreeing with respondents to keep said barge fully insured and to include the cost of insurance in the hourly charge for the services of the barge, assumed the risk of loss to said barge by fire and other usual marine risks." (Ap. 231.)

The burden of proof was on respondents to establish that the insurance was for their benefit.

The Turret Crown, C.C.A.N.Y. 1924, 297 F. 766, 780.

Kennelly v. Frederick Starr Contracting Co., C.C.A.N.Y. 1918, 250 F. 229, 230.

White v. Upper Hudson Stone Co., C.C.A.N.Y. 1917, 248 F. 893, 896.

Respondents did not sustain the said burden of proof. It is enough to quote from the testimony of Howard F. Lauritzen who contracted with Captain (Ed. M.) Foy for the use of the barge. He said:

"Q. How long have you known Captain Foy?

A. I don't know just how long I have known Captain Foy. I have known of the Foys for many years. I was born and raised on the river. Mr. Foy has been around there many years. * * *

Q. Do you know he is a little deaf?

A. Yes; I know he is a little deaf.

Q. This conversation you said you had with him, is it your statement that you, in effect, said exactly what you said in that letter; in other words, that you repeated back to Captain Foy that the rental was to include the operator and fireman and water, fuel, oil, and insurance?

A. That is right.

Q. In other words, you repeated that back over the phone to him?

A. That is right.

Q. Mr. Foy told you that they were insured, didn't he?

A. He said the equipment, the barge, was fully covered with insurance.

Q. And he said nothing about giving you any benefit of any insurance, did he?

A. He said that—when I repeated to him then about including the time per hour on the insurance—yes, he did, that it would include the insurance.

Q. He did not say you were to get the benefit of the insurance; what he said was, 'Yes, we have insurance protecting us'?

A. No; he said, 'The derrick barge is fully covered with insurance.' That, 'the derrick barge is fully covered.'

Q. Did he say 'we'?

A. I think he said, 'We were fully covered,' meaning him and the derrick barge.

Q. He didn't at any time say that you were protected by that insurance, Bundensen & Lauritzen had the benefit of that insurance; he never at any time said that, did he?

A. No; he did not say those words." (Ap. 183-184.)

Respondents' claim respecting insurance is destroyed by the foregoing testimony. The court did not make a direct finding that under the contract of the parties the insurance was for the benefit of respondents. The finding made was wholly inadequate as a substitute for a direct finding of that character. It was wholly inadequate, moreover, to support a conclusion of law that libelant by reason of insurance "assumed the risk of loss to said barge by fire". In reality, the finding made was meaningless: the conclusion of law a *non sequitur*. The authorities above cited make it certain that the carrying and collecting

of insurance by libelant conferred no rights upon respondents and constituted no defense to the libel.

6. THE APPELLANT IS ENTITLED TO A TRIAL DE NOVO.

The appeal being in admiralty, the appellant is, of course, entitled to a trial *de novo.* In that connection it was recently said in *The Portaritisa,* C.C.A. Fla. 1942, 131 F. 2d 362, that it is the duty of an appellate court on such an appeal "to review the whole case and make such decree as ought to have been made." A case often cited on the subject is the decision of this court in *The Ernest H. Meyer,* C.C.A. Cal. 1936, 84 F. 2d 496, 500-1. There it was said that the findings of the trial court in admiralty will be disturbed on appeal if they are clearly against *"the weight"* of the evidence; that the *"whole evidence"* must be weighed on appeal; that it is the duty of the appellate court to make independent *"examination, thought, and judgment";* and that the presumption that the findings of the trial court are correct is *"of lesser weight and more easily may be rebutted",* where, as here, a substantial part of the evidence before the trial court consists in deposition testimony. There was very recent confirmation of the case in *The Wildwood,* C.C.A.Wash. 1943, 133 F. 2d 765, 768.

An application of these principles, it is sincerely urged, will bring the conviction that the judgment herein should be reversed.

CONCLUSION.

For the several reasons herein appearing, it is therefore respectfully submitted that the decree appealed from should be reversed.

Dated, Stockton, California,
August 29, 1944.

DARRAH & ELLIS,
GUARD C. DARRAH,
AGLER B. ELLIS,
SINGLE, BRYANT, COOK AND HERRINGTON,
Proctors for Appellant.

No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation),

Appellant,

vs.

JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN (a copartnership),

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Page

I. Statement of the case 2

II. Questions involved 5

III. The findings of the trial court are entitled to great weight and should not be disturbed except for plain error 6

IV. Appellant's assignment of errors is insufficient 8

V. Summary of argument 9

VI. Appellant assumed the risk of loss to its barge by fire by its agreement that the barge was fully insured, that such insurance would be kept in force and that the cost of the insurance was included in the hourly charge for the services of the barge 10

VII. Appellant, having agreed to furnish and pay the crew of the barge, was responsible for their acts in the normal operation of the barge 23

A. Appellant agreed to furnish the crew for the barge and was responsible for their action in the ordinary operation of the barge 24

1. Appellant had and exercised full control over the crew in the ordinary operation of the barge 31

B. Appellee did not have possession, control or management of the barge 34

C. The contract between the parties did not constitute a demise of the barge 37

VIII. The damage to the barge was not caused by negligence on the part of the fireman but was due to the failure of the equipment of the barge to function properly or to defective fuel oil 40

A. Westall, the fireman, was not negligent 42

B. The fire and resulting damage to the barge was due to the failure of the equipment to function properly or to defective fuel oil 49

Conclusion 53

Table of Authorities Cited

Pages

Aktieselskabet Stavangeren v. Hubbard-Z S.S. Co., 250 Fed. 67, 70 (5 C.C.A.) 36
American Surety Co. v. Fischer Warehouse Co., 88 F. 2d 536, 538-539 (9 C.C.A.) 8
Arizonan, The, 136 Fed. 1016 (E.D.N.Y.) 31, 37

Barnstable, The, 181 U.S. 464, 469, 45 L. Ed. 954, 958 16
Bartley v. Borough Development Co., 214 Fed. 296, 303 (E.D.N.Y.) 52
Beaver, The, 219 Fed. 139, 141 (9 C.C.A.) 23, 33, 35, 37, 39
Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U.S. 199, 211, 38 L. Ed. 688, 692 52

Caledonia, The, 157 U.S. 124, 134, 39 L. Ed. 644, 647 52
Cary Brick Co. No. 8, The, 34 F. 2d 981, 983 (S.D.N.Y.) .. 29
C. F. Harms Co. v. Turner Const. Co., 290 Fed. 612, 631 (E.D.N.Y.) affd. 3 F. 2d 591 49
Commercial Molasses Corp. v. New York T.B. Corp., 314 U.S. 104, 110, 114, 86 L. Ed. 89, 95, 98 40
Crowley Launch & T. Co. v. Wilmington Transp. Co., 117 F. 2d 651, 653 (9 C.C.A.) 7, 14

Dailey v. Carroll, 248 Fed. 466 (2 C.C.A.) 28
Dempsey v. Downing, 11 F. 2d 15, 17 (4 C.C.A.) 52
Dennis v. Roberts, 19 F. 2d 1, 2 (9 C.C.A.) 28
Donovan v. New York Trap Rock Co., 271 Fed. 308, 309 (2 C.C.A.) 29

Frank Waterhouse v. Rock Island Alaska Mining Co., 97 Fed. 466, 476 52

Hall-Scott Motor Car Co. v. Universal Ins. Co., 122 F. 2d 531, 538 (9 C.C.A.) 21
Hansen v. Dupont, 33 F. 2d 94, 95-96 (2 C.C.A.) 23, 39
Harbor Towboat Co. v. Lowe, 47 F. Supp. 454, 456 (N.D.N.Y.) 33, 34
Hastorf v. F. R. Long-W. G. Broadhurst Co., 239 Fed. 852, 854 (2 C.C.A.) 28
Heranger, The, 101 F. 2d 953, 957 (9 C.C.A.) 6
Hodges v. Standard Oil Co., 123 F. 2d 362, 363 (4 C.C.A.) 7

Pages

Humphreys Gold Corp. v. Lewis, 90 F. 2d 896, 898 (9 C.C.A.) 8

Ira S. Bushey & Sons v. W. E. Hedges & Co., 40 F. 2d 417, 418 38

J. L. Luckenbach, The, 1 F. Supp. 692, 694 (S.D.N.Y.) ... 32
John Russel, The, 68 F. 2d 901 (2 C.C.A.) 22
Johnson v. Andrus, 119 F. 2d 287, 288 7
Junior, The, 279 Fed. 407, 408 (2 C.C.A.) 29

Kennelly v. Frederick Starr Contracting Co., 250 Fed. 229 (2 C.C.A.) 20
Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283, 285 (4 C.C.A.) 24, 40

M. & J. Tracy, Inc. v. Sound S.S. Lines, Inc. 140 F. 2d 532, 534 7
Monongahela, The, 282 Fed. 17, 20 (9 C.C.A.) 24, 40, 48

Newport News Shipbuilding & Drydock Co. v. U. S., 34 F. 2d 100 (4 C.C.A.) 15, 19, 21
Nicholson Transit Co. v. Nicholson-Universal S.S. Co., 43 F. 2d 427, 432, affd. in 60 F. 2d 90, 92 (6 C.C.A.) 21
North American Dredging Co. v. McAllister Steamboat Co., 202 Fed. 181, 183 (2 C.C.A.) 39

O'Brien Bros. v. City of New York, 7 F. 2d 485, 487 (E.D.N.Y. affd. 7 F. 2d 488) 49

Patton-Tully Transp. Co. v. Barrett, 37 F. 2d 516, 521 (6 C.C.A.) 36, 43, 52, 53
Peerless, The, 282 Fed. 1000 (S.D.N.Y. affd. 282 Fed. 1004) 29, 34
Petterson Lighterage & T. Corp. v. New York Central R. Co. 126 F. 2d 992, 994 (2 C.C.A.) 7

Raymond M. White, The, 290 Fed. 454, 457 (E.D.N.Y. affd. 296 Fed. 1023) 29

Shamrock Towing Co. v. City of New York, 32 F. 2d 684, 685 (2 C.C.A.) 24, 40, 48

Pages
S. J. Brice & Sons v. Christiani & Nielsen, 30 Ll. L.R. 177 17, 19, 38
Southern Railway Co. v. Prescott, 240 U.S. 632, 640, 60 L. Ed. 836, 840 47

Trenton, The, 72 F. 2d 283, 286 (2 C.C.A.) 28
Tucker v. Reading Co., 127 F. 2d 527, 528 (2 C.C.A.) 29
Turret Crown, The, 297 Fed. 766 19

Underweser Reederi v. Potash Imp. Corp., 36 F. 2d 869, 870 (5 C.C.A.) 52

Volund, The, 181 Fed. 643 (2 C.C.A.) 30, 35

West Arrow, The, 7 F. Supp. 827, 835, 80 F. 2d 853, 856 (2 C.C.A.) 51
White v. Upper Hudson Stone Co., 248 Fed. 893 (2 C.C.A.) 20
Work v. Leathers, 97 U.S. 379, 380, 24 L. Ed. 1012, 1013 .. 36, 52

No. 10,687

IN THE

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For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation),

Appellant,

vs.

JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN (a copartnership),

Appellees.

BRIEF FOR APPELLEES.

The questions presented by this record are very largely questions of fact. The trial Court heard and saw all of the witnesses, except one. The findings of fact thereafter made by the trial Court resolved the conflict in the testimony of the witnesses in favor of appellees. The record will show that the evidence amply supports such findings of fact. No controversial nor unsettled principles of law arise upon the facts established by the findings.

I.

STATEMENT OF THE CASE.

On the 14th day of May, 1941, appellant and appellee Bundesen & Lauritzen made and entered into an oral agreement for the services of appellant's derrick barge "FOY NO. 2" as follows:

Appellant agreed to furnish to said appellee Bundesen & Lauritzen the services of the derrick barge "FOY NO. 2" in connection with the construction of an outfall sewer by said appellee for the United States Navy near Vallejo, California. Appellant agreed to furnish the services of the said barge until the completion of said construction work provided appellee found that the barge was suitable and capable of performing the contemplated services. Appellant agreed to furnish the services of said barge as aforesaid for the charge of $10.00 per hour of actual use with a minimum charge for four hours on any day the barge was steamed up. Appellant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Appellant stated that the said barge was fully insured and agreed to keep the barge fully insured. Appellee Bundesen & Lauritzen agreed to pay said hourly charge for the services of said barge for each hour of actual use with the minimum charge as aforesaid. Said appellee also agreed to pay the wages of the operator and fireman for any time, after said minimum of four hours, short of eight hours per day, as the operator and fireman had to be paid for a minimum of eight hours on any day they worked. Appellee also agreed to pay appellant for towing the said barge to and from the place of appellee's con-

struction work. (Finding of Fact III, Ap. 226-227; testimony, Ap. 89, 168-170, 175, 183.)

On May 15, 1941, appellant towed said barge from Oakland, California, to the place of appellee's construction work on the Napa River; that thereupon appellant informed appellee that appellant would be unable to furnish its operator and fireman to operate the barge and requested appellee to secure a crew to operate the barge for appellant and to deduct the wages of such crew from the hourly charge for the services of the barge. Appellee, pursuant to such request, sent D. E. Williams and Adrian A. Westall, as operator and fireman, respectively, to operate the barge for appellant. Williams and Westall operated the barge on May 16, 19 and 20, 1941, and were paid by appellee who deducted their wages from the amount due from appellee to appellant for the services of the barge. (Finding IV, Ap. 227; testimony, Ap. 172, 198. Respondents' Ex. E, Ap. 96.)

On May 21, 1941, a fire occurred on board said barge, causing considerable damage. The fire occurred while fireman Westall was engaged in getting up steam on the boiler. The fire resulted from an explosion in the firebox and spread rapidly over the barge. (Ap. 47-49, Libelant's Ex. 5, Ap. 210-212.)

The trial Court found that the explosion was caused by the failure of the equipment of the barge to function properly and by reason of defective fuel oil and that it was not due to any negligence on the part of Westall or on the part of appellees. (Finding V, Ap. 228-229.) The evidence supporting such finding will be discussed later herein.

Shortly after the fire had occurred on the barge, appellant sent to appellee a bill dated May 21, 1941, for the services of the barge on May 16, 19 and 20, 1941, in the sum of $315.00. The bill contained the following note: "Derrick destroyed by fire 5.00 A.M. May 21st. Additional charge will be made for towing hull to Greenbrae when released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire." (Respondents' Ex. A, Ap. 88.)

Appellee promptly returned said bill to appellant with a letter in which appellee set forth the terms of the oral agreement for the use of the barge and denied any liability for damage to the barge under the terms of the oral agreement. (Respondents' Ex. B, Ap. 89, 171.) Appellant made no reply questioning the statement of the oral agreement set forth in said letter. (Ap. 91.) However, appellant thereupon sent a new bill to appellee also for the sum of $315.00 for the services of the barge, but omitting the note set forth above relative to the fire. (Respondents' Ex. C, Ap. 93, 171.) Appellee then paid the bill (Respondents' Ex. C), deducting therefrom, as had been agreed, the wages advanced to the fireman and engineer. (Respondents' Ex. D, Ap. 94, 171.)

Appellant admittedly informed appellee when the oral agreement was made that the barge was fully insured. (Ap. 84, 100.) The barge was insured for an agreed value of $12,000.00, which amount was paid to appellant by the insurers for the damages arising to the barge by reason of the fire. (Ap. 106.)

II.

QUESTIONS INVOLVED.

Appellant has not accurately set forth the questions involved on this appeal. Appellant overlooks that the issues were determined against it by the trial Court on conflicting testimony.

This appeal does not involve a consideration of conflicting or unsettled principles of law. The applicable law is well settled. Therefore, the following propositions may be definitely set forth to the Court:

1. The finding of the trial Court that the barge was fully insured, that appellant agreed that the hourly charge would include the cost of insurance, and that it would keep the barge fully insured clearly precludes any recovery by appellant for any damage to the barge caused by fire, irrespective of whether the fire was due to alleged negligence on the part of appellee or not. (Findings III and VII, Ap. 226, 230.)

2. The finding that the damage was due to unseaworthiness of the barge's equipment and was not due to any negligence on the part of appellee, requires a decree for appellees irrespective of whether the oral agreement constituted a demise charter or a charter for the services of the barge. (Finding V, Ap. 228-229.) The essence of appellant's case in either event is proof that the damage resulted from negligence on the part of appellee.

3. The finding that Westall, the fireman, was the employee of appellant in operating the barge requires a decree for appellees, for the only negligence charged is based on the acts of Westall. (Finding IV, Ap. 227-228.)

The issue presented on this appeal is, therefore, whether or not there is evidence to support the findings of the trial Court. In other words, is there plain error in the findings of fact made by the trial Court?

III.

THE FINDINGS OF THE TRIAL COURT ARE ENTITLED TO GREAT WEIGHT AND SHOULD NOT BE DISTURBED EXCEPT FOR PLAIN ERROR.

Appellant states that it is entitled to a trial *de novo* and for that reason apparently expects this Court to review all the evidence, weigh the evidence, evalute the evidence, determine the credibility of the witnesses and give little weight to the findings of the trial Court.

The judge below heard and saw all of the witnesses, except one. The one exception was Westall, the barge fireman, who testified by deposition. He was alone on the barge on the morning of the fire and his testimony relates almost wholly to his actions at that time. The conflict in the testimony was not between Westall and the other witnesses, but the conflict was in the testimony of the witnesses heard and seen by the judge below.

Under these circumstances the applicable rule is set forth in *The Heranger*, 101 F. (2d) 953, 957 (9 C.C.A.):

> "This Court has adhered to the rule that findings and conclusions of the District Court in an admiralty case will be affirmed on appeal, unless the record discloses some plain error of fact or misapplication of some rule of law."

The other circuits follow the same rule. In *Hodges v. Standard Oil Co.,* 123 F. (2d) 362, 363 (4 C.C.A.), the Court said:

> "There is no better established principle of admiralty law than that questions of fact, resolved by a trial judge on conflicting evidence, are entitled to great weight and will not be reversed except for plain error."

In *Johnson v. Andrus,* 119 F. (2d) 287, 288, the Second Circuit Court of Appeals said:

> "While it is true that Admiralty Rule 46½, 28 U.S.C.A., following section 723, does not declare that the findings of a judge shall have the same weight in the admiralty as in other civil causes (Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c), there should be no difference and they are to stand unless 'clearly erroneous'."

So, in *M. & J. Tracy, Inc., v. Sound S.S. Lines, Inc.,* 140 F. (2d) 532, 534, Judge L. Hand said:

> "The appeal is another illustration of what apparently it is so hard for the bar to accept: that, in cases where the judge has seen all the witnesses, we will ordinarily resolve disputed questions of fact in favor of his findings."

The authorities are reviewed in *Petterson Lighterage & T. Corp. v. New York Central R. Co.,* 126 F. (2d) 992, 994 (2 C.C.A.).

The above authorities are particularly applicable in this case where the credibility or recollection of various witnesses was a matter which the trial judge necessarily determined.

> *Crowley Launch & T. Co. v. Wilmington Transp. Co.,* 117 F. (2d) 651, 653 (9 C.C.A.).

IV.

APPELLANT'S ASSIGNMENT OF ERRORS IS INSUFFICIENT.

The assignments of error made by appellant merely state in effect that the Court was wrong in its holdings and conclusions. Appellant has failed to indicate in what respect or for what reason the findings or conclusions of the Court are claimed to be in error. Such assignments of error are manifestly insufficient.

American Surety Co. v. Fischer Warehouse Co., 88 F. (2d) 536, 538-539 (9 C.C.A.).

Thus, appellant's assignment of errors numbers 1, 2, 3, 4, 5 (Ap. 236) merely state that the Court erred in failing to make certain findings. Appellant does not state why or in what respect the Court erred in failing so to find.

Appellant's assignments of error numbers 7, 8, 9, 10 and 11 (Ap. 236-238) likewise state that the Court erred in making certain findings without indicating the respect or reason why such findings are in error.

Assignment of errors numbers 6, 12, 13, 14, 15 and 16 (Ap. 236, 238-239) are merely statements that the Court erred in entering a decree for appellees and in making certain conclusions of law. Such assignments have repeatedly been held to be too general for consideration.

American Surety Co. v. Fischer Warehouse Co., supra;

Humphreys Gold Corp. v. Lewis, 90 F. (2d) 896, 898 (9 C.C.A.).

Thus, none of appellant's assignments of error comply with Admiralty Rule 3 of this Court.

V.

SUMMARY OF ARGUMENT.

The decree of the District Court dismissing the libel is correct because:

1. Appellant assumed the risk of loss to its barge by fire by its agreement that the barge was fully insured, that such insurance would be kept in force and that the cost of the insurance was included in the hourly charge for the services of the barge.

2. Appellant, having agreed to furnish and pay the crew of the barge, was responsible for their acts in the normal operation of the barge.

a. Appellant agreed to furnish the crew for the barge and was responsible for their actions in the ordinary operation of the barge.

(1) Appellant had and exercised full control over the crew in the ordinary operation of the barge.

b. Appellee did not have possession, control or management of the barge.

c. The contract between the parties did not constitute a demise of the barge.

3. The damage to the barge was not caused by negligence on the part of the fireman but was due to the failure of the equipment of the barge to function properly or to defective fuel oil.

a. Westall, the fireman, was not negligent.

b. The fire and resulting damage to the barge was due to the failure of the equipment to function properly or to defective fuel oil.

VI.

APPELLANT ASSUMED THE RISK OF LOSS TO ITS BARGE BY FIRE BY ITS AGREEMENT THAT THE BARGE WAS FULLY INSURED, THAT SUCH INSURANCE WOULD BE KEPT IN FORCE AND THAT THE COST OF THE INSURANCE WAS INCLUDED IN THE HOURLY CHARGE FOR THE SERVICES OF THE BARGE.

Appellees will discuss the above point first because the finding and conclusion of the trial Court on this issue is alone sufficient to support the decree dismissing the libel.

The District Court found as follows:

> "* * * Libelant agreed to furnish and include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Libelant stated that the said barge was fully insured and agreed to keep the barge fully insured. * * *" (Finding III, Ap. 227.)

> "Libelant informed respondents at the time the oral agreement for the services of said barge was made that said barge was fully covered by insurance. Libelant did have and kept in force at all times herein mentioned policies of marine insurance on said barge in which said barge was insured and valued for the sum of $12,000.00 against loss or damage by fire and other specified perils. Libelant made claim upon the insurers for loss by reason of the fire occurring on said barge on May 21, 1941, and pursuant to such claim received payment from said insurers of the sum of $12,000.00." (Finding VII, Ap. 230.)

The Court made the following conclusion of law based on the foregoing findings:

> "Libelant, by agreeing with respondents to keep said barge fully insured and to include the cost of

insurance in the hourly charge for the services of the barge, assumed the risk of loss to said barge by fire and other usual marine risks." (Conclusion of Law IV, Ap. 231.)

The evidence and applicable law fully support the findings and conclusion of law of the District Court.

Howard F. Lauritzen, one of the appellees, who made the oral agreement with Ed. M. Foy, representing appellant, testified as follows:

"* * * Then I asked if the derrick barge was insured and he said it was fully covered by insurance. Then I said, 'Your $10 per hour includes the operator, fireman, oil, water, and the insurance?' And then he said, 'Yes'; and then I said, 'Well, that sounds all right.' * * *" (Ap. 170.)

"Q. On that occasion did you have a conversation with Mr. Foy and Mr. Darrah?

A. I did.

Q. Would you please state what was said?

A. After looking the thing over there, I talked to Mr. Foy about getting the derrick barge moved out of there. I believe he told me as soon as the insurance people were satisfied, he would move it, or they were going to move it. Then the question came up about our verbal agreement with Mr. Foy, which I went over there with him at the time about this agreement and about the insurance on the thing, that the thing that I wanted straight in my mind at the time was that our conversation over the phone was clear, so that the insurance companies wouldn't take subrogation and sue me on the thing, and at the time Mr. Darrah spoke up and said, I believe, 'that is the

agreement with Mr. Foy. You have nothing to worry about. Mr. Foy will live up to his contract.'

Q. What had you stated, if anything, as to the verbal agreement on the insurance?

A. Well, that he was to have it; and he was to carry insurance on the thing; he was to carry insurance on it. He was insured; that was included in the price of $10 an hour, the insurance." (Ap. 175.)

The cross-examination of Mr. Lauritzen on the issue of insurance is set forth in appellant's brief, pages 29-30, and likewise shows that the barge was insured and that it was agreed that the hourly charge would include the insurance.

It is not clear from the testimony of Mr. Ed. Foy whether or not he disputes the testimony of Mr. Lauritzen as to the agreement of appellant to keep the insurance in force and that the hourly charge included the insurance. Mr. Ed. Foy testified that, so far as he could now recall he said nothing about insurance on the barge except that appellant was "fully covered". (Ap. 84, 99-100, 109-110, 111.) Mr. Foy was definitely hazy in his recollection of various matters connected with the transaction. (Ap. 91, 108, 217.)

The trial Court who saw and heard both witnesses was required to determine whatever conflict there was in their testimony. Such conflict was determined in favor of appellees. (Finding III, Ap. 227.) Aside from the impressions formed by the trial Court from hearing and seeing the witnesses, there are a number of relevant additional circumstances which permitted the trial Court to resolve with certainty the conflict in the testimony.

Shortly after the fire, appellant sent appellee a bill dated May 21, 1941, the date of the fire, for the use of

the derrick barge. (Respondents' Ex. A; Ap. 88.) This bill contained the following note:

> "Derrick destroyed by fire 5:00 A.M. May 21st. Additional charge will be made for towing hull to Greenbrae when released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire."

Appellee promptly returned such bill to appellant with a letter in which appellee set forth the substance of the oral contract for the services of the large. (Respondents' Ex. B, Ap. 89.) This letter, dated May 29, asserted that appellant had agreed to furnish, and the hourly charge of $10.00 included, an operator, fireman, water, fuel, oil and insurance. Appellee also asserted in the letter that "As your company agreed to carry the insurance we cannot assume any liability in connection with the fire."

Appellant made no reply to such letter. (Ap. 91.) But appellant did in effect confirm the statements contained in the letter. For, after receipt of the letter, appellant sent a new bill, without comment, to appellee for the use of the barge, but *omitted* from the new bill all reference to any alleged liability for damage due to the fire. (Respondents' Ex. C, Ap. 93, 171.)

Appellant, by its failure to challenge the statements contained in appellee's letter and by changing its bill to conform to such letter, certainly acquiesced with appellee's statement of the substance of the oral agreement as set out in such letter and also then acquiesced with appellee's position with respect to any claim of liability which might be asserted.

The letter referred to above was read to and by Mr. Foy while on the witness stand. First he testified that the letter correctly set forth the substance of the oral agreement. (Ap. 98.) Later, after a recess, on redirect examination, he denied that the carrying of insurance by appellant had been mentioned. (Ap. 109.) Still later he admitted that the hourly charge of $10.00 was to include insurance but stated that no mention was made as to whether the insurance covered appellee. (Ap. 110.)

Finally, appellant admits that Mr. Lauritzen inquired whether the barge was insured and that appellant replied that it was "fully covered." (Ap. 84.) It is not logical to believe that Mr. Lauritzen made such inquiry merely out of idle curiosity and then let the matter of insurance drop. He was obviously interested in protection, not mere information.

It is, of course, the province of the trial Court to determine the credibility and powers of recollection of the witnesses appearing before it.

Crowley Launch & T. Co. v. Wilmington Transp. Co., 117 F. (2d) 651, 653 (9 C.C.A.).

The determination of such matters by the trial Court should certainly be conclusive where, as here, the additional undisputed circumstances support the conclusion of the trial Court. The finding of the trial Court as to the terms of the oral agreement relating to insurance is, therefore, amply supported by the evidence. (Finding III, Ap. 227.)

However, appellant does not actually attack the sufficiency of the evidence to support the finding of the trial Court as to the provisions of the oral agreement relating

to insurance. Appellant, on the contrary, without any assignment of such alleged error, attacks the sufficiency of Finding No. VII to support Conclusion of Law No. IV. (Brief, pages 28-30.) The latter conclusion of law is, however, supported by and based upon Finding No. III which appellant does not discuss at all with respect to the issue of insurance. Appellant, then, does not dispute the sufficiency of the evidence to support the finding that:

> "Libelant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Libelant stated that the said barge was fully insured and agreed to keep the barge fully insured." (Finding III, Ap. 227.)

The facts so found establish that appellant by such agreement as to insurance assumed the risk of loss to the barge by fire and other usual marine risks.

Thus in *Newport News Shipbuilding & Drydock Co., v. U. S.*, 34 F. (2d) 100 (4 C.C.A.), certiorari denied in 280 U.S. 599, 74 L. Ed. 645, the United States contracted with a shipyard for the repair of a vessel. The contract provided that the shipyard should hold the United States harmless against all losses, "provided, however, that the United States Lines will continue the present hull, machinery and equipment insurance upon the vessel * * *". The vessel was seriously damaged by fire due to the negligence of the shipyard. In denying recovery against the shipyard to the extent of the specified insurance, the Court said, pages 106, 107:

> "A careful examination of the circumstances leading up to and surrounding the making of the contract must lead to the conclusion that it was intended by

the parties that the United States assumed, by the insurance clause, the risk of loss by fire up to the amount of $2,000,000 and that this assumption of risk was not only for the benefit of the United States, but for the benefit of the shipyard also. To hold otherwise would be to hold that the agreement on the part of the United States to carry the 'present hull, machinery and equipment insurance' had absolutely no meaning whatever, and was of no value to the shipyard."

* * * * * * *

"To say that the meaning of the provision in the contract, as to insurance, was that the United States was only to protect itself, and to allow recovery from the shipyard for the total of the damages, would be to place the parties in the exact situation they would have been in without any provision whatever in the contract as to insurance. Something must have been intended by the parties when the insurance provision was written in the contract."

The contract in the present case is far more certain as to the assumption of the damage by fire by appellant than the contract in the above case. For, here, appellees admittedly did not agree to be responsible for and save appellant harmless against all losses. (Ap. 104.) Furthermore, appellant here did not merely agree to continue the insurance, but agreed that the hourly charge included insurance. In effect, therefore, appellee paid for the cost of the insurance.

In *The Barnstable,* 181 U.S. 464, 469, 45 L. Ed. 954, 958, the Supreme Court construed the effect of a clause in a charter which provided "that the owners shall pay for the insurance on the vessel". The charterer claimed that

such provision required the owner to take out special insurance covering collision liability. The Court held that the clause did not go that far, but did say, which is pertinent here, as follows:

> "It may be conceded, however, that for any damage to the vessel coverable by an ordinary policy of insurance 'on the vessel', the owners must look to the companies, at least for the insured porportion of such damage, and not to the charterers."

Again, the contract now involved is more favorable to appellants than the clause considered above, for appellant here was required to do more than merely pay for insurance. It agreed to carry insurance. Furthermore, appellant's barge was represented to be "fully covered" and appellant collected the insurance.

In *S. J. Brice & Sons v. Christiani & Nielsen,* 30 Lloyd's List Law Reports 177, a charterer of a derrick barge wrote to the owner: "It has been agreed between us that you insure the barge, crane, and gear against all risks, you to insure the barge to a reasonable value, and we to pay." The barge was damaged by the charterer's negligence, but in holding the charterer exempt from liability for the damage the Court said, page 179:

> "I find in this contract that the parties agreed with one another that the owners should insure against all risks at the expense of the hirer. It seems to me that that points most clearly to this: that the hirer stipulates that as regards risks he is not to be responsible for them; as regards risks the owner is to insure, and the hirer will pay for it. That is what I think it means. I think it indicates clearly—it is not well put, of course, it might be expanded—but it indi-

> cates quite clearly that the foundation of this clause is an arrangement that the hirer is to be free of risk and is not to take the risk, but he will pay for it being insured against, and that is what I think it means, and I think that there is no difficulty in that; it is a very common sense arrangement for these people to have made."

The above authorities clearly establish that appellant's agreement to furnish and include full insurance in the hourly charge for the services of the barge and to keep the barge insured, as stated in undisputed Finding No. III (Ap. 227) relieves appellee of any liability it may otherwise have had for damage to the barge by fire or other marine risk.

As stated above, appellant does not question the sufficiency of the evidence to support Finding No. III relating to insurance. (Ap. 227.) Appellant merely questions the sufficiency of Finding No. VII (Ap. 230) to support Conclusion of Law No. IV. (Ap. 231.) Since such conclusion of law was based on Finding No. III, appellant's contention completely collapses. Finding No. VII merely establishes the fact that the barge was fully insured and that appellant collected its full loss from the insurer, whereas Finding No. III sets forth appellant's agreement to furnish such insurance.

Appellant apparently hoped to distract the Court's attention from such pertinent finding by referring solely to Finding No. VII. For, appellant is well aware that appellee relies upon appellant's agreement to furnish insurance and not merely upon the fact that appellant

did in fact carry and collect insurance for the loss. (Respondents' Ex. B, Ap. 89.)

Appellant states that appellees have the burden of proof to establish that the insurance was for their benefit. (Brief, page 29.) This is not an accurate statement. Since appellant agreed to furnish full insurance, appellee would have been relieved of liability whether or not appellant did in fact provide such insurance. It is the agreement of appellant to furnish insurance, not the insurance itself, which relieves appellee of liability.

Newport News Shipbuilding & Drydock Co. v. U. S., 34 F. (2d) 100, 107 (4 C.C.A.);

S. J. Brice & Sons v. Christiani & Nielsen, 30 Lloyd's List Law Reports 177, 180.

Appellee did, as shown in the above discussion of the evidence and the findings of the Court, prove appellant's agreement to furnish insurance.

The three cases cited by appellant are not in point. *The Turret Crown*, 297 Fed. 766, involved the relationship of shipper and common carrier, so the latter could not validly contract either against its own negligence or *require* the shipper to procure insurance. The carrier's bill of lading contained a benefit of insurance clause which was wholly ineffective because such clause voided the shipper's insurance. The bill of lading clause was not an agreement to insure or to furnish insurance, but merely applied to such insurance as the shipper *might* have. Since there was no insurance, there could be no benefit.

Appellant also cites *Kennelly v. Frederick Starr Contracting Co.,* 250 Fed. 229 (2 C.C.A.) and White v. Upper Hudson Stone Co., 248 Fed. 893 (2 C.C.A.). In those cases, the vessel owner had insurance applicable within fixed geographical limits. The owner made no agreement whatever to furnish insurance, to keep it in force or to include it in the charter hire. However, the charterer there agreed that *if* he took the vessel outside the territorial limits fixed, he would pay for an extension of the policy to cover such additional limits. Obviously, since the owner had not agreed to carry any insurance, the charterer had no defense against the owner based on the insurance. If the charterer had desired to protect himself, he would have had to make such arrangement with the insurer, which he did not do.

Appellant states that the trial Court made no direct finding that the insurance was for the benefit of the appellees. The Court found the terms of the agreement and made therefrom the proper conclusion. As stated before, it would have been immaterial to appellee whether or not appellant did in fact procure insurance, for appellant agreed to insure and appellee is entitled to the benefit of such *agreement.*

Appellant certainly was not contracting for the privilege of being sued by an insurer instead of being sued by the barge owner. When appellant agreed to provide various items, an operator, fireman, water, fuel, oil and full *insurance* for a specified hourly charge to be paid by appellee, it certainly must have been intended that appellee was to receive the benefit of such items. One is ordinarily entitled to receive the benefit of that which it

is agreed to provide him for a price. Otherwise, the agreement between the parties as to insurance would, as stated in *Newport News Shipbuilding & Drydock Co. v. U. S.*, supra, be utterly meaningless.

> *Nicholson Transit Co. v. Nicholson-Universal S.S. Co.*, 43 F. (2d) 427, 432, affirmed in 60 F. (2d) 90, 92 (6 C.C.A.).

This action is, of course, prosecuted for the benefit of the insurer who paid appellant the loss under the policies. (Ap. 106.) The effect of the agreement between appellant and appellee as to insurance is not in any way dependent upon the consent or knowledge of the insurer as to the terms of the agreement.

For, as stated in *Nicholson Transit Co. v. Nicholson Universal S.S. Co.*, 60 Fed. (2d) 90, 91 (6 C.C.A.):

> "While insurers are subrogated to the rights of the insured, the issues are unaffected thereby. The underwriters' rights are purely derivative; they may assert all that but no more than libelant might have claimed."

Similarly, this Court said in *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F. (2d) 531, 538 (9 C.C.A.):

> "The practical effect of the agreement between the parties was to give the Motor Car Company the benefit of the fire insurance coverage of the owner of the gasoline launch during the short period necessary for the removal of one engine and the installation of another. It is true that the contract does not mention insurance but if, as seems likely, the parties had such insurance in mind, it is certainly an anomaly to permit the insurance company to recover from the Motor Car Company on the ground that the insured

had no right to make such a contract. However, we do not base our decision upon the fact that there was fire insurance in the case at bar."

Quite apart from the contract between the parties for insurance, it also appears that two of the three policies on the barge, produced by appellant, name appellant as the assured "for account of whom it may concern". (Respondents' Exhibits H, I & G, not printed.) If, as appellant contends, appellee was the demise charterer of the barge, appellee had an insurable interest in the barge. Appellee would, then, be entitled to recover the full amount of such policies, even if insurance had not been mentioned or provided for in the oral contract. Since the loss has been paid pursuant to the insurance policies, appellant may not recover against appellee either for itself or for the insurers.

In *The John Russel,* 68 F. (2d) 901 (2 C.C.A.), the owner of a barge chartered her to the State of New York and agreed to pay for insurance on cargo for "benefit of whoever it may concern." A policy was issued to the charterer and cargo owner as named assureds "for account of whom it may concern." The cargo was lost and the insurer paid to the cargo owner the amount of the loss. The cargo owner then sued the barge owner for the benefit of the insurer. The Court denied a recovery, stating, page 902:

> "Insurance carried for account of 'whom it may concern' covers anyone having an insurable interest in the insured property at the time of the happening of the loss. *Hogan v. Scottish Ins. Co.,* 186 U.S. 423, 46 L. Ed. 1229. It is not essential that the person

> covered by the insurance should be known to the one procuring the insurance or even to the underwriter at the time, if the insurance is carried for the account of 'whom it may concern.'."

The evidence and the applicable law, therefore, required the finding and conclusion of the trial Court that appellant's agreement to furnish and include full insurance in the hourly charge for the services of the barge was an assumption by appellant of the risk of loss to the barge from fire. The insurers, for whose benefit this action is prosecuted, are bound by appellant's agreement.

VII.

APPELLANT, HAVING AGREED TO FURNISH AND PAY THE CREW OF THE BARGE, WAS RESPONSIBLE FOR THEIR ACTS IN THE NORMAL OPERATION OF THE BARGE.

Appellant contends that the agreement for the use of the barge was a demise. (Brief, page 7.) Generally speaking, a demise transfers possession and control of a vessel to the charterer, i.e., a demise is in effect a bailment for hire. On the other hand, as found by the trial Court, where the owner retains possession and control of the vessel through his crew or otherwise, the contract is merely one to perform a service or for the use of the vessel. (Findings III and IV, Ap. 226-228.)

The Beaver, 219 Fed. 139, 140 (9 C.C.A.);
Hansen v. Dupont, 33 F. 2d 94, 95-96 (2 C.C.A.).

Appellant apparently hopes that if the contract constituted a demise, it can fasten liability by inference upon appellee for the damage to the barge. However, the law

is well settled that, even under a demise, the owner must prove that the damage resulted from negligence on the part of the charterer.

The Monongahela, 282 Fed. 17, 20 (9 C.C.A.);
Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283, 285 (4 C.C.A.);
Shamrock Towing Co. v. City of New York, 32 F. 2d 684, 685 (2 C.C.A.).

The damage to appellant's barge was admittedly due to fire. (Finding V, Ap. 228; Appellant's Brief, p. 3.) Appellant contends that the fire was due to negligence on the part of the fireman, Westall, in the ordinary course of his duties in getting steam on the barge's boiler. (Brief p. 16.) Under these circumstances, the important question is not whether or not the contract was a demise. The important question is whether appellant or appellee was responsible for Westall's actions, in event he was negligent.* For, appellant could be and was under the agreement responsible for Westall's actions, even if the agreement constituted a demise of the barge.

A. Appellant Agreed to Furnish the Crew For the Barge and Was Responsible For Their Actions in the Ordinary Operation of the Barge.

The findings of the Court on this point are as follows:

> "* * * Libelant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. * * *" (Finding III, Ap. 227.)

*We shall discuss later herein the evidence which amply supports the trial Court's finding that Westall was not negligent.

"On the 15th day of May, 1941, libelant pursuant to said oral agreement as aforesaid, towed said derrick barge from Oakland, California, to the place of respondent's construction work on the Napa River; that thereupon Libelant informed respondent that libelant was unable to furnish its operator and fireman to operate said barge and requested respondent to secure another operator and fireman to operate the barge for libelant and to deduct the wages of such operator and fireman from the hourly charge for the services of the barge. Respondent, pursuant to libelant's said request, did secure D. E. Williams and Adrian A. Westall to operate said barge as operator and fireman, respectively, for and on behalf of Libelant. Said D. E. Williams and Adrian A. Westall did operate said barge at said place on the 16th, 19th and 20th days of May, 1941, as operator and fireman for and on behalf of libelant. Respondent paid to said D. E. Williams and Adrian A. Westall the amount due to them for their services as operator and fireman on said barge as aforesaid and thereafter deducted as agreed with libelant, the amount so paid to said Williams and Westall from the amount due from respondent to libelant for the services of said barge. Said barge was at all times herein mentioned in the possession of libelant and the operation, maintenance and care of said barge was at all said times under the exclusive control and management of libelant." (Finding IV, Ap. 227-228.)

Such findings clearly establish that appellee had no responsibility for any negligence on the part of the fireman in the performance of his duties. The sole question is, therefore, whether the evidence supports the findings made by the trial Court. Upon this appeal appellant has

the burden and duty to demonstrate plain error in such findings.

Appellant, however, with great restraint, refers sparingly to the evidence. Reference is made only to the evidence favorable to appellant and such reference includes misstatements and unwarranted constructions of its plain meaning.

Mr. Lauritzen testified that appellant agreed to furnish a fireman and operator to operate the barge and that their wages were included in the hourly charge for the use of the barge. (Ap. 170, 172, 185, 186, 193.)

However, appellant subsequently informed Mr. Kitchen, appellee's job superintendent, that appellant could not furnish its regular operator or fireman to operate the barge and requested appellee to get another operator and fireman to operate the barge for appellant. These facts appear from the testimony of Mr. Lauritzen and Mr. Kitchen. (Ap. 172, 185, 186, 198-199.)

Appellant does not really dispute the foregoing testimony. Its witnesses in fact support appellee's testimony. Mr. Ed. Foy, general manager of appellant, who made the oral agreement for the use of the barge with Mr. Lauritzen, testified that while he could not furnish a crew, he told Mr. Lauritzen to furnish the crew and charge their wages back to appellant. (Ap. 84-85.) Mr. Foy also admitted that the hourly charge to appellee for the use of the barge included the operator and fireman. (Ap. 110.) There is no dispute about the fact that appellee did pay the operator and fireman's wages directly and then charged the amount thereof back to appellant. (Ap. 101, 172.) There was, of course, no reason for including the

wages of the crew in the hourly charge unless appellant had agreed to furnish a crew. Appellant was unable to offer any other rational explanation for such procedure. (Ap. 101.)

Mr. Ralph Foy, appellant's superintendent of equipment, testified that he was on hand to take care of the barge when it first arrived at the scene of appellee's construction job. (Ap. 222.) He testified that he then informed Mr. Kitchen that appellant would not be able to furnish a crew and that appellee would have to get the crew. (Ap. 148, 220.) It is perfectly obvious that Mr. Foy would not have appeared when the barge reached the job, *after the agreement had been made,* to tell appellee that he had no crew and request appellee to secure a crew, unless appellant had in fact, as the trial Court found, agreed to furnish the crew. In fact, Mr. Foy was pretty hazy about the whole matter, as the Court below said. (Ap. 148-149, 219.) But Foy's actions in arriving "to take care of it" and in actually firing up the boiler, show that he then recognized appellant's obligation under the agreement. (Ap. 222.)

We have previously pointed out that appellant did not dispute the terms of the oral agreement as set forth in appellee's letter to appellant shortly after the fire had occurred. (Respondents' Ex. B, Ap. 89.) On the contrary, appellant by its actions acquiesced in the statements contained in such letter, supra, pages 12-13.

The evidence thus thoroughly supports the finding of the trial Court that appellant agreed to furnish an operator and fireman to operate the barge and that their wages were included in the hourly charge for the use of the barge.

Appellant was, therefore, responsible for the acts of the operator and fireman in the ordinary care and operation of the barge, even if the agreement constituted a demise charter.

Thus, in *Hastorf v. F. R. Long-W. G. Broadhurst Co.,* 239 Fed. 852, 854 (2 C.C.A.), involving a demise charter of a scow, the Court said:

> "Between the owner and the charterer in case of such boats, the former is liable for any injury to the boat by reason of the negligence of her master in caring for her."

Similarly, in *Daily v. Carroll,* 248 Fed. 466 (2 C.C.A.), a frequently cited case, Judge Hough held that a bargeman furnished along with a barge under a demise charter was acting for the owner of the barge in the care and ordinary operation of the barge.

In *Dennis v. Roberts,* 19 F. 2d 1, 2 (9 C.C.A.), this Court recognized the same rule, stating:

> "At most the owner assumed the risk of loss resulting from a failure on the part of Nations to exercise ordinary skill and care in performing work ordered by appellant, but upon the latter rested the risk of extraordinary hazards inhering in the task he imposed."

In *The Trenton,* 72 F. 2d 283, 286 (2 C.C.A.), another case of a demise charter, the Court said:

> "Yet, as between the owner and the charterer of the Trenton, the owner is liable for any damage caused not only to the Trenton, but by the Trenton, because of the negligence of her master in caring for her after she was moored."

The same rule has been repeatedly stated:

Tucker v. Reading Co., 127 F. 2d 527, 528 (2 C.C.A.);

The Junior, 279 Fed. 407, 408 (2 C.C.A.);

Donovan v. New York Trap Rock Co., 271 Fed. 308, 309 (2 C.C.A.);

The Cary Brick Co. No. 8, 34 F. 2d 981, 983 (S.D. N.Y.);

The Raymond M. White, 290 Fed. 454, 457 (E.D. N.Y. affirmed 296 Fed. 1023).

The fact that appellee secured the fireman and operator and paid them in the first instance at the request of and for appellant, when the latter failed to furnish its regular crew as agreed, does not alter the rule. Under the agreement appellant had the obligation to furnish the crew and the responsibility for their actions flows from that obligation regardless of the source from which the crew was obtained.

In *The Peerless,* 282 Fed. 1000 (affirmed 282 Fed. 1004), where an owner sued a charterer for loss of a barge held under a demise, Judge Learned Hand said, page 1002:

> "First, as to the dispute between the libelant (owner) and the charterer: Mr. Purdy does not question under the charter that the bargeman was the agent of the libelant when originally hired. I think it equally plain that the substituted bargemen, including Murray, who was on board when the accident happened, were also the agents of the owner. It is true that the charterer chose him, but he chose him with the consent of the libelant, and in accordance with a practice of some standing whenever an occasion arose, and it is quite clear that no other system was possible, considering how transitory is the em-

ployment of these men, and the fact that they might leave wherever a barge happened to be. Unless the charterer had the right to substitute a bargeman, his use of the barge would be much limited. This the libelant recognized, and clearly consented to substitution at the choice of the charterer, by continuing to pay the wages of those so chosen.

"In this view the charterer's duties extended to no more than reasonable care in the selection of a competent man, and there is no just ground to challenge the selection of the charterer in this particular case. Individually, neither the libelant nor the charterer is at fault for the fault of Murray, but, as Murray was in law the agent of the libelant, his fault is by law charged against him. Therefore the charterer appears to me to have made a good excuse for his failure to return the barge, and against him I dismiss the libel."

The same conclusion was reached in *The Volund,* 181 Fed. 643 (2 C.C.A.), where a supercargo and pilot employed by the charterer and on board the vessel on behalf of the charterer was temporarily entrusted with the navigation of the vessel by the owner's master, the Court held that the charterer had no liability for a collision occurring while the charterer's supercargo was navigating the vessel. The Court said, pages 666-667:

"Since the navigation remains in the hands of the owner, all instrumentalities (human or otherwise) which he uses to conduct it are his own while thus employed, no matter from what source he obtains them. We have no question here as to navigation in waters where the law compels the employment of some local pilot. For the consequences which may result from the failure of any of these instrumen-

talities properly to do the work the owner who is employing them may be liable; he cannot escape liability for damages done by his vessel in consequence of her being improperly navigated because the person in fault was temporarily assigned by someone else to assist him in doing the work which was distinctively his own." * * *

"Nor are we persuaded that, although the Higginson Company (charterer) selected Nelson as its supercargo and paid his salary, it remained his responsible employer when he was engaged in the operation of navigating the vessel for the shipowners, especially since, as we construe the charter, the master need not have allowed him to conduct the navigation unless he was satisfied to entrust it to him, and if dissatisfied could have removed him."

Likewise in *The Arizonan,* 136 Fed. 1016 (E.D.N.Y.; reversed on other grounds in 144 Fed. 81), the Court said, page 1017:

"In the case at bar the owner agreed to furnish the charterer 'with the services of the tugboat * * * fully manned and equipped', and paid the members of the crew for their services. They were the servants of the owner. The fact that the owner selected them, in whole or in part, from the charterer's night crew, did not change the legal relation."

1. Appellant Had and Exercised Full Control Over the Crew in the Ordinary Operation of the Barge.

In addition to the obligation to furnish the crew assumed by appellant under the contract, the evidence shows without conflict that fireman Westall did in fact receive all his directions and instructions as to manner of performing his work from appellant.

Mr. Lauritzen testified that he told fireman Westall to go and work for Mr. Foy on the Foy derrick barge. (Ap. 172, 186.) He further testified that he did not at any time give Westall any orders as to the operation of the barge. (Ap. 173.)

Mr. Kitchen testified that Foy was to instruct the operator and fireman secured for appellant by appellee, so that they could carry out their duties to Foy's satisfaction. (Ap. 199.)

Mr. Ralph Foy, appellant's superintendent, testified that he showed Westall how to start the fire, get up steam, operate the valves, and in general, the duties of a fireman on that particular barge. (Ap. 133, 141, 148.)

Westall, the fireman, testified that he received all his directions and instructions as to the manner of performing his duties from appellant's employees. (Ap. 44-45, 50, 69.) It also appears that on the day following the fire, appellant's attorney took Westall's statement of the accident. (Ap. 210.) Certainly appellant would not have considered itself at liberty to take the statement of Westall unless appellant considered him to be its employee.

The J. L. Luckenbach, 1 F.S. 692, 694 (S.D.N.Y.).

It, therefore, appears that appellant did in fact instruct and direct the fireman in his duties in the firing of the boiler and its care in accord with appellant's obligation under the agreement.

Appellant, without mentioning the foregoing testimony, argues that appellee had the direction and control of the fireman and states that the fact that appellant "secured" the fireman would not be decisive. (Brief pp.

13-14.) However, the cases cited above show that appellant was responsible for the fireman's actions in the normal operation of the barge, even if the agreement was a demise so as to give appellee possession and control of the barge.

The evidence referred to by appellant in this connection certainly does not place any responsibility upon appellee for the fireman's actions. Appellant refers to Westall's testimony that he was working for appellee at the time of the fire. But Westall was not aware of the terms of the agreement between appellant and appellee and he was not aware of the legal effect of that agreement nor could he change its effect. Westall was told that Foy would show him how to operate the barge. (Ap. 69.)

Harbor Towboat Co. v. Lowe, 47 F. Supp. 454, 457 (N.D.N.Y.).

Appellant states that appellee told Westall when to come and fire the boiler and when to quit. True, but that right was inherent in the agreement, as even Mr. Ed. Foy recognized. (Ap. 84.) A charterer, whether the charter be a demise or a contract for services, may direct when and where the vessel is to operate.

The Beaver, 219 Fed. 139, 141-142 (9 C.C.A.).

Appellant also states that appellee paid Westall. We do not know why appellant mentions that fact. Appellee did pay Westall directly but was repaid by appellant in accord with their agreement. (Respondents' Ex. D, Ap. 94, 172.) So, appellant did finally pay Westall's wages as it had admittedly agreed to do. (Ap. 85.) No change in

the contractual relation between the parties arose from such dealings.

The Peerless, 282 Fed. 1000, 1002 (S.D.N.Y.);
Harbor Towboat Co. v. Lowe, 47 F. Supp. 454, 456 (N.D.N.Y.).

Appellant overlooks or seeks to evade the fact that its responsibility for the actions of the fireman in performing his ordinary duties arises from its agreement to furnish and pay a crew to operate the barge. There is no pretense or claim by appellant that the damage to the barge arose from any order or direction given to the fireman by appellee. Appellant simply claims that Westall was negligent in performing his ordinary duties as a fireman in firing the boiler. (Brief pp. 19-20.) Appellee, under the numerous authorities cited above, pages 28-29, has no responsibility for such alleged negligence even under a demise charter.

B. Appellee Did Not Have Possession, Control or Management of the Barge.

Appellant towed the barge to appellee's job and also towed it away after the fire. (Ap. 85, 170.) After the barge reached the place of work, its position for working was practically stationary except for the effect of the tides. (Ap. 168, 198.) Nevertheless, appellant contends that the evidence shows that appellee had possession, control and management of the barge. (Brief pp. 10-12.) This point is immaterial since, as just discussed above, appellant was in any event responsible for the acts of the fireman in performing his normal duties.

However, the evidence does not support appellant's contention. Appellant argues that the provision of the

agreement that the rate of $10.00 per hour would be charged only for each hour the barge actually worked, with a minimum charge for four hours on any day the barge was "fired up", necessarily vested complete dominion over the barge in appellee. Appellant's theory is that, by such arrangement, appellee alone could say when and how long the barge would work. Such argument is, of course, a palpable *non sequitur*. At the most it merely demonstrates that appellant made a bad bargain.

However, appellant apparently knew the need for the barge's services, the work to be done, and could estimate the expected financial return. (Ap. 151.) The very fact that appellee was to pay $10.00 per hour only for each hour of actual use indicates definitely a contract for the services of the barge. If appellant had intended to turn over complete dominion of the barge to appellee, then appellant would certainly have demanded an hourly or daily minimum charge while appellee had the barge whether the barge was used or not. A demise is invariably predicated on a flat charge for a daily, monthly or other period of time.

But even a time charterer, who admittedly does not have control, management or possession of a vessel, nevertheless has the right to determine when, where and how long a vessel shall work. The exercise of such rights by a charterer does not establish nor indicate any control or right to control the manner in which the crew of a vessel shall operate or care for her and does not make the charterer liable for their acts in the normal operation of the vessel.

The Volund, 181 Fed. 643, 666 (2 C.C.A.);
The Beaver, 219 Fed. 139, 141 (9 C.C.A.).

Appellant also states that appellee overhauled the barge equipment. The testimony does not warrant such statement. Appellee did do some work so that the winch drums would operate safely. (Ap. 202.) Appellee had no obligation nor responsibility to do such work, since appellant warranted the good working condition of the barge, irrespective of whether the contract was a demise or a contract for services.

Patton Tully Transp. Co. v. Barrett, 37 F. 2d 516, 521 (6 C.C.A.);

Work v. Leathers, 97 U.S. 379, 380, 24 L. Ed. 1012, 1013.

Appellant, having warranted the good working condition of the barge, was liable to reimburse appellee for the value of such work. (Ap. 170.)

Aktieselskabet Stovangeren v. Hubbard-Z S.S. Co., 250 Fed. 67, 70 (5 C.C.A.).

Hence the fact that appellee did some work on certain equipment of the barge, so that it could commence work, instead of waiting and notifying appellant to do such work, does not indicate that appellee had possession, control or management of the barge. It shows merely a right in appellee to recover from the appellant the value of such services.

Appellant also asserts that appellee kept a foreman on board the barge "to tell the men what to do". There is no such testimony in the record. Mr. Kitchen testified that he told the foreman "on the job" what to do. (Ap. 214.) The "job" was the construction of a sewer "across the mud flats". (Ap. 168.) The men referred to were working on that job. They were not operating the barge,

as appellant would apparently seek to infer by its inadequate and inaccurate reference to the record. The operator and fireman operated the barge. Appellee's men worked on the construction job ashore, under and around the boom of the derrick barge. (Ap. 202.) Naturally, some of these men were on and off the barge during the course of their work. (Ap. 215.) But that fact does not show that appellee had possession, control or management of the barge. It is not claimed that any of these men damaged the barge.

Appellee was entitled under a contract for the services of the barge to the exclusive use of the whole barge, without thereby assuming any responsibility for the operation of the vessel.

The Beaver, 219 Fed. 139, 141 (9 C.C.A.);
The Arizonan, 136 Fed. 1016, 1017 (E.D.N.Y., reversed on other grounds, 144 Fed. 81).

Appellee's men were, therefore, entitled to go on and off the barge in performing their work and in so doing they obviously did not subject appellee to any liability for damage alleged to be due to the actions of the fireman in performing his duties.

C. The Contract Between the Parties Did Not Constitute a Demise of the Barge.

Appellant's major contention is that the contract between the parties was a demise and that hence appellee had possession and control of the barge. (Brief p. 8.) We have already pointed out that it is not important whether the contract was a demise or contract for services, since appellee has no liability in either event for

damage to the barge arising from the alleged negligence of the crew which appellant agreed to furnish.

Appellant carefully refrains from discussing the terms of the contract here involved, but relies upon the general rule that a charter of a barge without motive power, even though accompanied by the owner's crew, is a demise. Such rule is, however, based on the fact that such barges must be towed to be used and are essentially subject to the control of the tugs which tow them. (*Ira S. Bushey & Sons v. W. E. Hedges & Co.,* 40 F. 2d 417, 418.) But, in the present instance, such reason does not obtain. The barge was towed by appellant to and from the place of appellee's construction job. (Ap. 85, 170.) The barge was not used for hauling while in tow of a tug. The barge was moored at the site of the construction work and its derrick, operated by the barge's equipment, was used to lift and place materials and equipment. (Ap. 202, 214.) Hence the only operation or use of the barge was in the hands of its crew, the fireman and operator. The situation was no different than where a vessel having motive power is navigated by her own crew.

Under these circumstances the reason for the rule relied upon by appellant ceases. None of the decisions cited by appellant refers to derrick barges so employed. However, in *S. J. Brice & Sons v. Christiani & Nielsen,* 30 Lloyd's List Law Reports 177, 178, the Court, in determining the effect of an agreement for the use of a derrick barge and its crew, said:

> "The defendants did not obtain possession as hirers simpliciter of this crane barge. They hired its services; it came under the service of the plaintiffs, and they found its wages, and the management of the

crane and the movement of the barge was under the control of its owners all the time."

The same holding was made with respect to a pump dredge in *North American Dredging Co. v. McAllister Steamboat Co.,* 202 Fed. 181, 183 (2 C.C.A.).

There is a general presumption that a charter of a vessel is not a demise, unless the language of the contract necessarily requires such a construction.

The Beaver, 219 Fed. 139, 141 (9 C.C.A.);

Hansen v. Dupont, 33 F. 2d 94, 96 (2 C.C.A.).

We do not believe that appellant will dispute that, except for the rule as to barges without motive power referred to above, the contract between the parties, as found by the trial Court, constituted a contract for services and not a demise. (Finding III, Ap. 226.)

Hansen v. Dupont, supra, at pages 95-96.

The contract was clearly for work or service to be performed. (Ap. 170.) Appellant billed appellee for "work done for your company". (Respondents' Ex. E, Ap. 96.) Appellant was to furnish and pay the crew and all operating supplies. (Ap. 170.) Under these circumstances, no demise was created. The barge was, therefore, in the possession and control of appellant through its crew. Appellant apparently concedes, as it must, that it can have no basis whatever for recovery unless the contract was a demise.

VIII.

THE DAMAGE TO THE BARGE WAS NOT CAUSED BY NEGLIGENCE ON THE PART OF THE FIREMAN BUT WAS DUE TO THE FAILURE OF THE EQUIPMENT OF THE BARGE TO FUNCTION PROPERLY OR TO DEFECTIVE FUEL OIL.

Appellant, of course, had the burden of proof to prove that the damage to the barge was caused by negligence on the part of appellee.

The Monongahela, 282 Fed. 17, 20 (9 C.C.A.);
Shamrock Towing Co. v. City of New York, 32 F. 2d 684, 685 (2 C.C.A.);
Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283, 285 (4 C.C.A.);
Commercial Molasses Corp. v. New York T.B. Corp., 314 U.S. 104, 110, 114, 86 L. Ed. 89, 95, 98.

The damage was admittedly caused by fire. (Appellant's Brief p. 3; Finding V, Ap. 228.) Appellant contends that the fire was due to negligence on the part of Westall, the barge's fireman, in the course of his ordinary duty of firing up the boiler. (Brief p. 16.) Since, as just discussed, appellant was responsible for the actions of the fireman in such respect, it is clear that appellant failed in any event to establish any negligence on the part of appellee. However, the evidence also shows that the fire was not due to any negligence on the part of the fireman.

The trial Court found as follows (Finding V, Ap. 228-229):

> "On the 21st day of May, 1941, while said fireman Adrian A. Westall was engaged in the process of getting up steam on the boiler of said barge in the usual, customary manner in which said Westall

had been directed and instructed by libelant, a fire occurred on said barge; that all damage suffered by said barge while at place of respondent's construction work was due to and caused by said fire; that subsequent to said fire libelant towed said barge away from the place of respondent's construction work.

"While Fireman Westall was engaged in getting up steam on the boiler of the barge as aforesaid, an explosion occurred in the firebox of said boiler which caused fire or burning oil to be thrown from the firebox onto the deck of the barge's fireroom; said fire spread rapidly forward on the barge, causing damage to various parts of the barge and its equipment; that the deck of the fireroom of said barge was covered and caked with oil. Said explosion was due to and caused by the failure of the equipment of the barge to function properly or by reason of defective fuel oil; the fuel line leading to the firebox on said barge was not equipped with a strainer; the damage to said barge was not caused by nor contributed to in whole or in part, by any neglect or lack of care, or any improper act or failure to act, in any respect whatsoever on the part of fireman Westall, or on the part of respondents or any of them; fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish said fire; fireman Westall was at all times herein mentioned a competent, experienced fireman and was not guilty of any neglect or lack of proper care at any time in the performance of his duties as fireman on said barge; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue."

The evidence amply supports the above finding of the trial Court. Any other finding would have been pure conjecture.

A. Westall, the Fireman, Was Not Negligent.

No complaint is made of the manner in which Westall fired up the boiler. (Appellant's Brief pp. 19-20.) He started the fire in the boiler firebox in the manner in which he had been instructed by Ralph Foy, appellant's marine superintendent. (Ap. 47-48, 59, 132-133.) Foy admitted that Westall appeared to be a competent fireman and was satisfied that he could operate the barge. (Ap. 134, 150, 166.)

The only claim appellant makes is that Westall was negligent in leaving the firebox for several minutes while he stepped out on deck to urinate. (Brief pp. 19-20.)

The boiler on this particular barge was an old type of logging boiler designed to burn wood or coal. (Ap. 115.) It had been converted to burn crude fuel oil, but before the crude oil could be used, sufficient steam had to be generated to atomize the oil. To generate sufficient steam for this purpose, diesel oil, atomized by compressed air was burned until there was about 40 pounds steam pressure which took about 40 minutes, referred to as the "generating" period. (Ap. 210-212.) The diesel oil flowed by gravity from a ten-gallon open barrel through a hose to the firebox. A small air compressor run by a little gas engine supplied the air pressure during the period. (Ap. 56, 62, 201, 210.) This system was admitted by one of appellant's expert witnesses to be a makeshift arrangement for firing a boiler. (Ap. 114, 115.) Mr. Lauritzen, who owns derrick and pile driver barges, testified that such a system of firing a boiler was not usual. (Ap. 179.)

Appellant does not, of course, contend that there was anything inherently dangerous in such a system of firing

a boiler. (Ap. 138.) The contention is that the fireman should remain at the firebox during the generating period because something *might* happen. (Ap. 159.) Such contention is fundamentally unsound because nothing should happen to cause the fire to go out, or to cause an explosion if the fuel is clean and the equipment is in good operating condition. (Ap. 174, 206.)

Appellee was not required to anticipate such failure of equipment.

Patton-Tully Transp. Co. v. Barrett, 37 F. 2d 516, 521-22 (6 C.C.A.).

Appellant refers to the testimony of Westall given on his deposition that it is better practice not to leave the boiler while it is generating. (Brief p. 21.) It is significant that the statement of Westall, taken down in the handwriting of appellant's attorney on the day after the fire contains no such implication. (Ap. 210-213.) Furthermore, appellant refers only to selected bits of Westall's testimony. He also testified that it was not the fireman's job to remain at the firebox all the time, that he had other jobs to do and could leave the fire when he was satisfied that it was burning satisfactorily. (Ap. 63.) He said that he had watched it for some time and was satisfied that it was operating properly before he went to the toilet on this occasion. (Ap. 59.)

Appellant states that two other witnesses called by it testified that the fireman should stay close to the fire while generating steam. (Brief p. 22.) However, neither of these witnesses testified that a fireman had to remain right at the firebox. Thomas Smith testified that there was no objection to a fireman going 30 or 40 feet away from the firebox if he were in sight of it. (Ap. 114.)

Henry Foss testified that there was no particular reason to watch the firebox, but that the fireman should remain in the vicinity of the boiler. (Ap. 121.) He also said that if the fireman could see what is going on he could safely be 30 or 40 feet away. (Ap. 122.)

Mr. Lauritzen testified that he had owned a derrick barge for ten years and had been around barge boilers for many years. (Ap. 173.) He said there was no necessity for remaining constantly at the boiler if the equipment is in good condition. (Ap. 174.) Mr. Kitchen, who had years of experience in operating barges with vertical boilers, testified that there was no need for a fireman to remain constantly at the firebox after lighting the fire. (Ap. 204.) He stated that a fieman was close enough if he were in sight of the boiler stack. (Ap. 208-209.) Ralph Foy, appellant's marine superintendent, admitted that an experienced fireman could tell by looking at the stack what was going on within the firebox and that the stack could be seen from almost any place on the barge. (Ap. 153.)

Now where was Westall for the several minutes he left the firebox "to go to the toilet"? When Westall's deposition was taken, he stated that he was "subjected to a call to the toilet". (Ap. 47.) There was a toilet in the house on the stern of the barge and appellant assumes that Westall went into that house. (Ap. 119, 131.) However, when Westall's statement was taken by appellant the day after the fire he stated merely that "I stepped out on deck to urinate". (Ap. 211.) The Court may well take judicial notice that Westall's statement accords with the well known customs of bargemen, particularly since he was gone only two or three minutes. (Ap. 60, 211.)

Westall's reference to a toilet in his deposition, taken more than two years after the fire, was, we believe, a concession to modesty induced by the formality of the occasion. In any event, the crew's quarters were locked. (Ap. 204.)

While he was out on deck Westall could see the boiler stack and thus observe at all times the operation of the firebox. The evidence does not, therefore, indicate any negligence on the part of Westall in stepping out on deck for several minutes, whether credence be given to the testimony of appellant's or appellee's witnesses.

Furthermore, at the time Ralph Foy instructed Westall in the operation of the barge, Foy did not, either by word or example, inform Westall that it was necessary for the fireman on this particular barge to remain in constant attendance before the firebox. (Ap. 51-52, 158.) At the time Foy showed Westall his duties and after the fire had been started in the firebox, Foy took Westall around the barge and showed him other duties to do during the so-called "generating" period. (Ap. 73.) It is strange indeed that Westall should now be accused of negligence for stepping out on the deck for several minutes, although Foy himself took Westall away from the firebox for a longer period of time while giving him his instructions. It would seem that appellant is now trying to apply a hindsight rule of special caution merely because something happened which should not have happened if the equipment had functioned properly.

Appellant's principal contention now is that Westall violated a safety order of the Industrial Accident Commission of the State of California and hence was negli-

gent. (Brief p. 22.) Such rule set out in appellant's brief is not applicable and was not violated for a number of reasons.

First of all, the rule is by its own terms not applicable to appellant's barge. The safety order referred to is one of a number of "Boiler Safety Orders" issued by the California Industrial Accident Commission. (Libelant's Exhibit No. 4, not printed.) These orders (p. 10) provide that they are applicable to various boilers, except: "1. Boilers under the jurisdiction or inspection of the United States Government". The barge in question was admittedly within the admiralty jurisdiction of the United States. (Appellant's Brief pp. 1-2.) There is here no question involved as to whether the State of California could take jurisdiction over the barge's boiler. For, the state safety orders expressly exclude any application where the United States has jurisdiction, not merely where the United States has exclusive jurisdiction. Hence the rule was not applicable to appellant's barge.

Second, the rule applies only to attendance on a boiler "while in active service". Active service is defined as that "portion of time when the main stop valve is open and the fires are burning". Appellant made no showing that the main stop valve was open when Westall stepped out on deck. Obviously, the main stop valve, which is the main outlet for steam from the boiler to the various operating machinery, was not open during the "generating" period. The rule, therefore, that appellant relies upon, while not applicable here at all, recognizes that the generating period is not the dangerous period from the standpoint of safety, but that the time for caution is

after the boiler has a full head of steam. The very rule, then, that appellant cites is itself a refutation of the claim that Westall was negligent.

Third, the rule states that a boiler shall not be left "unattended", but it does not state that a fireman must idly stand and constantly watch the firebox. The rule was certainly intended to be reasonable. Surely, if a fireman is on the barge where the boiler is located and is only 30 feet from the firebox, the boiler is not "unattended". (Ap. 60.) The reference in the rule to automatic control indicates that by "unattended" is meant leaving a boiler for long periods of time.

The trial Court was, on the whole evidence, manifestly correct in concluding that Westall was not negligent in leaving the firebox for several minutes.

Since the damage to the barge was admittedly caused by fire, appellee discharged any burden of explaining the loss which it may have had. Appellee did not have such burden at all unless the contract between the parties was first shown to be a demise. However, proof that the cause of damage was fire in the normal operation of the barge exonerated appellee from liability in the absence of affirmative proof of its negligence.

Thus in *Southern Railway Co. v. Prescott,* 240 U.S. 632, 640, 60 L. Ed. 836, 840, the Supreme Court said:

> "The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of a warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due

> to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence."

In *Shamrock Towing Co. v. City of New York,* 32 F. 2d 684, 685 (2 C.C.A.), an action by the owner of a barge against a demise charterer for damage to the barge, the Court said:

> "Mere proof that fire occurred is not sufficient upon which to base negligence. The appellee failed to sustain the burden it had of establishing the cause of the fire and that such cause was a negligent one, for which appellant was responsible."

In *The Monongahela,* 282 Fed. 17, 21 (9 C.C.A.), a case involving the sinking of a barge under demise, this Court said:

> "True, it cannot be said with entire satisfaction that the Board established what was the definite, precise cause for the leaking and capsizing of the barge. Yet there was sufficient evidence for the judge to draw the inference that the charterer was not negligent. It might have been one of several things, or a combination of things. * * *"

> "Granting, however, as we do, that there is uncertainty in respect to which of the several conditions was the proximate cause of the loss, still the defendant's evidence, when considered with plaintiff's, left the case in equipoise—a situation where, considering the whole evidence upon the issue of negligence, the Crowley Company, as the affirming party, must fail. * * *."

To the same effect are:

O'Brien Bros. v. City of New York, 7 F. 2d 485, 487 (E.D.N.Y., affirmed 7 F. 2d 488);

C. F. Harms Co. v. Turner Const. Co., 290 Fed. 612, 613 (E.D.N.Y., affirmed 3 F. 2d 591).

Appellant failed to prove that the fire was due to negligence either on the part of Westall, or on the part of appellee, but the evidence does show that the fire was caused by the unseaworthiness of the barge's equipment.

B. The Fire and Resulting Damage to the Barge Was Due to the Failure of the Equipment to Function Properly or to Defective Fuel Oil.

Westall testified that he had watched the firebox for some time and was satisfied that it was operating properly before he stepped out on deck. (Ap. 59.) He stated that several minutes later while on his way back to the firebox, he heard an explosion and hurried back to find fire burning on the deck around the firebox. (Ap. 49, 50-60.)

The explanation offered by Westall for the explosion was that the diesel oil, fed by gravity, had, due to some obstruction or air bubble in the fuel line, temporarily ceased to flow; that when the oil started to flow again the heat of the firebox caused gases which ignited and the resulting explosion threw burning oil onto the oil-soaked deck of the fireroom. (Ap. 51-52, 210-212.) This also seemed to be the theory of Ralph Foy and Henry Foss, other witnesses called by appellant. (Ap. 121, 158-159.)

There was nothing done or undone by Westall which stopped the flow of the fuel oil, so his alleged non-attendance at the firebox was not the proximate cause of the explosion and ensuing fire. The stoppage of the fuel flow may, according to Westall, have been due to an air bubble in the line, water in the fuel, or dirt in the line. (Ap. 52, 63, 64.) Henry Foss said that the fire might go out for different reasons or foreign substances in the fuel might cause an explosion.

Mr. Lauritzen stated that a plug in the line, dirty fuel or a poor connection in the line would cause the fire to go out. (Ap. 182.)

Ralph Foy stated that rope yarn might get into the fuel tank, or dust might get into the fuel, or a lot of things can happen to the fuel. (Ap. 159.)

Appellant furnished the fuel used on the barge and it also impliedly warranted the good working condition of the barge. (Ap. 105.) So everything which could have caused the stoppage of the fuel was due either to appellant's fault or the inherent nature of its equipment.

Appellant's barge was a very old one and it was not in good condition. (Ap. 104, 150.) The equipment for firing and operating the boiler was a makeshift affair. (Ap. 114, 115.) The diesel oil used for firing up was contained in an open tank or barrel. (Ap. 56-57.) The line between the diesel tank and the burner was partly a hose, although the line should have been made of metal. (Ap. 114, 116.) Diesel oil has a deleterious effect on fabric or rubber. (Ap. 114.) It may well be that bits of the hose, eaten away by the oil, or dirt got into the open fuel tank

and plugged the fuel line or burner. The fuel line contained no strainer. (Ap. 160.) A strainer was obviously necessary to keep dirt out of the burner. (Ap. 182.)

The West Arrow, 7 F. Supp. 827, 835, 80 F. 2d 853, 856 (2 C.C.A.).

If the line had been equipped with a strainer no dirt could have reached the burner and if the flow of fuel had been stopped at the strainer, the flow could not have resumed until the strainer were cleaned.

There was no drip pan beneath the firebox, so any escaping oil went onto the wooden deck. (Ap. 58.) The deck in the fireroom was oil caked and saturated. (Ap. 57, 61, 64, 200-201.) The condition of the deck made it a fire hazard and the fire spread very rapidly. (Ap. 61.)

Westall tried to smother out the fire as soon as he discovered it, but it spread too rapidly. (Ap. 49, 60-61.) An effort was also made to use the bilge pump to extinguish the fire, but the pump would not start and the hose connected to it was too short. (Ap. 58-59, 203.)

While no one knows precisely what caused the fuel line to plug, it is fairly certain that the fuel did temporarily stop flowing and that the explosion occurred when the flow resumed. The proximate cause of the fire was, therefore, the failure of the barge's equipment to function properly or the condition of the fuel oil.

Appellant's discussion of the effect of unseaworthiness on its right to recover is not clear to appellee. (Brief pp. 24-25.) First, appellant states that there is a presumption of seaworthiness and the burden of showing unseaworthiness is upon the one asserting it. There is more than doubt as to the correctness of such contention, for appel-

lant overlooks that it warranted the good condition of the barge.

Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U.S. 199, 211, 38 L. Ed. 688, 692;

Underweser Reederi v. Potash Imp. Corp., 36 F. 2d 869, 870 (5 C.C.A.).

However, here the contention does not require any discussion because the very nature of the accident establishes the unseaworthiness of the barge's equipment.

Work v. Leathers, 97 U.S. 379, 380, 24 L. Ed. 1012, 1013;

Bartley v. Borough Development Co., 214 Fed. 296, 303 (E.D.N.Y.).

Appellant also states that appellee had an opportunity to examine the barge and hence waived its patent defects. Appellee did not examine and did not have an opportunity to examine the barge *before* the oral agreement was made. In any event we presume that appellant does not admit that the defective condition of the equipment was patent. The implied warranty of seaworthiness applies to defects patent as well as latent, unless the charterer has undertaken to inspect a vessel and does know of her defects *before* accepting her.

The Caledonia, 157 U.S. 124, 134, 39 L. Ed. 644, 647;

Patton-Tully Transp. Co. v. Barrett, 37 F. (2d) 516, 521 (6 C.C.A.);

Dempsey v. Downing, 11 F. (2d) 15, 17 (4 C.C.A.).

However, in this case such issue is not material. Appellant is either confused or seeking to confuse. For, the decision in *Frank Waterhouse v. Rock Island Alaska Mining Co.,* 97 Fed. 466, 476, cited by appellant, involved a

claim *by the charterer* against the owner for an allowance due to absence of certain appliances which claim was disallowed because the charterer had accepted the vessel knowing that she did not have such appliances.

It is too obvious for argument that a vessel owner cannot himself *recover* damages for injuries to his vessel arising from unseaworthiness (in breach of his warranty of seaworthiness), even if the charterer has inspected the vessel or expressly agreed to return her in good condition.

Patton-Tully Transp. Co. v. Barrett, 37 F. (2d) 516, 522 (6 C.C.A.).

It is submitted that Westall, the fireman, was not negligent, although appellee would not be responsible for his alleged negligence in any event, but that the evidence shows, as the trial Court found, that the damage was due to the failure of the barge's equipment to function properly or to the defective fuel oil supplied by appellant.

CONCLUSION.

It is submitted that the evidence and applicable law required the following conclusions of the trial Court:

1. Appellant assumed the risk of damage to its barge by fire by its agreement to keep the barge fully insured and to include the cost thereof in the charge for the services of the barge.

2. Appellant, having agreed to furnish and pay the crew of the barge, was responsible for their acts in the normal operation of the barge.

3. The damage to the barge was not due to negligence on the part of the fireman or on the part of appellee, but was due to the failure of the equipment of the barge to function properly or to defective fuel oil.

Any one of the above conclusions require an affirmance of the decree.

Dated, San Francisco, California,
October 30, 1944.

Respectfully submitted,
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Derby, Sharp, Quinby & Tweedt,
Of Counsel.

No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation), *Appellant,*
vs.
JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN (a copartnership), *Appellees.*

APPELLANT'S CLOSING BRIEF.

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Subject Index

		Page
1.	Appellant's assignments of error are sufficient	2
2.	Appellant is entitled to a trial de novo	2
3.	There was no waiver or release	3
4.	Appellant did not assume the risk of loss	4
5.	The oral agreement was a demise charter and the fireman Westall was appellees' employee	9
6.	The damage was caused by the negligence of the fireman	15
Conclusion		19

Table of Authorities Cited

	Pages
American Surety Co. v. Fischer Warehouse Co., 88 F. (2d) 536 (9 C.C.A.)	2
Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104, 86 L. Ed. 89	15
Hall-Scott Motor Car Co. v. Universal Ins. Co., 122 Fed. (2d) 531 (9 C.C.A.)	8
Humphreys Gold Corp. v. Lewis, 90 F. (2d) 896 (9 C.C.A.)	2
Kennelly v. Frederick Starr Contracting Co., 250 Fed. 299 (2 C.C.A.)	8
Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283 (4 C.C.A.)	15
McAllister Bros. v. Pennsylvania R. Company, 118 Fed. (2d) 45 (C.C.A. NY—1941)	2
Newport News Shipbuilding and Drydock Co. v. U. S., 34 Fed. (2d) 100 (4 C.C.A.)	6, 7, 8
S. J. Brice and Sons v. Christiani and Neilsen, 30 Lloyd's List Law Reports, 177	7
Second Pool Coal Co. v. Peoples Coal Co., 188 Fed. 892, cert. den. (1911, 223 U. S. 727)	6
The Ariadne, 13 Wall. 475	3
United States v. Shea, 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403	10, 12
White v. Upper Hudson Stove Co., 248 Fed. 893 (2 C.C.A.)	8

No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation), *Appellant,*
vs.
JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN (a copartnership), *Appellees.*

APPELLANT'S CLOSING BRIEF.

Appellees, in their brief, contend that the questions herein involved are largely questions of fact, and that the conclusions of law, based on the findings, involve no "controversial" or "unsettled" principles. With this we cannot agree. Although there are findings of fact which we believe are not supported by the evidence, we believe that the application of law to facts not disputed has been erroneously made.

1. APPELLANT'S ASSIGNMENTS OF ERROR ARE SUFFICIENT.

Citing *American Surety Co. v. Fischer Warehouse Co.,* 88 F. (2d) 536, 538-539 (9 C.C.A.), and *Humphreys Gold Corp. v. Lewis,* 90 F. (2d) 896, 898 (9 C.C.A.), appellees claim that the assignments of error made by appellant are insufficient.

These assignments taken as a whole as well as individually point out in what respect the findings and the conclusions are wrong. They indicate the particular manner in which the fireman was negligent; point out the particular acts and omissions wherein negligence existed, and this is all that is required. (*American Surety Company v. Fischer Warehouse Co.,* supra.)

It is submitted that all of appellant's assignments of error comply with Admiralty Rule 3 of this Court, and that neither the Court nor appellees are misled as to appellant's contentions on appeal.

2. APPELLANT IS ENTITLED TO A TRIAL DE NOVO.

Appellees cite six cases to sustain their contention that findings of fact of the District Court in an admiralty case are entitled to great weight and will not be reversed unless the record discloses plain error of fact or misapplication of rule of law. But, it is also said, that the Appellate Court may disregard such findings if they are contrary to the weight of evidence or are against the preponderance of the evidence. (*McAllister Bros. v. Pennsylvania R. Company,* 118 Fed. (2d) 45 (C.C.A. NY–1941).) And how is this

Court to determine this? As was said in *The Ariadne,* 13 Wall. 475, 479,

> "The right of appeal is a substantial right and not a shadow. It involves examination, thought and judgment."

We believe that "examination, thought and judgment", on the part of this Court will result in a conclusion on its part that not only is the preponderance of the evidence contrary to the findings of fact as found by the lower Court, but that also there has been a plain misapplication of a rule of law, based on the findings of fact made.

The only testimony with reference to the start of the fire and the events occurring at that time was the deposition of Fireman Westall. This Court is in as good a position as the lower Court to evaluate that evidence and we feel that it conclusively shows that the fireman was negligent, which negligence caused the destruction of the barge, as will be hereafter discussed.

An appeal in admiralty still partakes of the nature of a trial *de novo,* and it is submitted that an examination of the record will convince this Court that the decree herein should be reversed.

3. THERE WAS NO WAIVER OR RELEASE.

An affirmative defense urged by appellees is that appellant, by failing to include on every statement sent to appellees for the rental of the barge a reserva-

tion of a claim for damage, thereby waived or released any such claim. (Ap. 33.)

In a bill dated the day after the fire, appellant notified appellees, "This statement does not release your company from further liability of settlement in connection with loss due to fire." (Ap. 88.) Appellees replied denying liability, but we have been cited to no rule of law that would require appellant to attach to every statement for rent of the barge a reservation of its claim for damages for the loss thereof.

There was no showing of any consideration for a release nor any settlement of the claim for damages.

This being an affirmative defense, the burden is on appellee to establish it. No citations of authority for their position have been given, and it is submitted that appellees have not met their burden.

4. APPELLANT DID NOT ASSUME THE RISK OF LOSS.

Appellees' principal defense, apparently, is that appellant assumed the risk of loss because, (1) its representative stated that the barge was fully insured and (2) that appellees contend the rent of $10.00 an hour included the insurance.

An examination of the pleadings will show that appellees have shifted their ground with respect to the insurance question. In paragraph IV of their second defense (Ap. 30) appellees contend that they are entitled to the benefit of the payment of insurance received by appellant. As to the excess of the value

over the amount received under the insurance policies, appellees plead in paragraph V of their second defense (Ap. 30-31) that appellant is estopped to recover damages because of the alleged breach of the agreement to keep the barge fully insured.

Appellees rely on the testimony of Howard F. Lauritzen, one of the appellees, to the effect that Ed M. Foy, representing appellant, agreed that the $10.00 per hour included the operator, fireman, oil, water, and insurance (Ap. 170), to sustain their position that there was an agreement to keep the barge insured. This testimony was flatly contradicted by Foy who said the only conversation about insurance was that Lauritzen asked, "Have you got insurance?", and Foy replied, "We are fully covered." (Ap. 109.) Lauritzen did not say that Foy stated the $10.00 hourly charge included insurance, but claims that he, Lauritzen, stated to Foy what the $10.00 an hour included and that Foy assented.

It should be pointed out that Foy was a little deaf and that Lauritzen knew it. (Ap. 183.) It is not contended that Foy ever said the $10.00 an hour charge included insurance, and the logical inference from the testimony of Lauritzen is that if he did use the word, "insurance," that Foy did not hear it.

In Finding No. III (Ap. 227) the Court found that appellant "agreed to keep the barge fully insured". There is not one scintilla of evidence upon which such a finding could be made.

Appellees assert that we attack only Finding No. VII and not Finding No. III. (Ap. 18.) The reverse

is true. (Ap. 237.) We do most earnestly question the sufficiency of the evidence to support Finding No. III wherein that finding establishes the fact that the $10.00 an hour includes the insurance and that appellant agreed to keep the barge fully insured.

Although appellees pleaded they had the benefit of insurance and also estoppel, the Court made no findings on these issues. In Conclusion of Law IV, the Court determined that appellant had assumed the risk of loss, a defense not conceived of by appellees, apparently, until they realized that the evidence did not sustain the "benefit of insurance" theory, or the "estoppel" theory.

Even if it be conceded that the $10.00 charge included insurance, the burden is still on appellees to establish that the insurance was for their benefit, and that appellant was estopped. This, they pleaded, and this they failed to do. The testimony of Lauritzen was that Foy never said that appellees were to be protected by the insurance. (Ap. 184.)

It should be pointed out that there was no amendment of the pleadings to conform to proof.

The proofs must conform to the issues tendered by the pleadings and so also must the decree.

Second Pool Coal Co. v. Peoples Coal Co., 188 Fed. 892, Cert. Den. (1911, 223 U. S. 727).

Appellees' theory of assumption of risk, apparently, an afterthought, is based on two cases:

Newport News Shipbuilding and Drydock Co. v. U. S., 34 Fed. (2d) 100 (4 C.C.A.),

and

S. J. Brice and Sons v. Christiani and Neilsen,
30 Lloyd's List Law Reports, 177.

In the *Newport News* case, supra, the engineer of the United States, the libelant, testified that the agreement was, "understood", as giving the shipyard the protection. There was also evidence that the shipyard company had reduced its bid for the repair of libelant's ship (destroyed by fire due to the shipyard's negligence) in consideration of the agreement to carry insurance. In fact, the U. S. did not carry insurance and the decision was based on this fact. This was a two to one decision and there was a strong dissenting opinion by Justice Parker, who, after stating that the case should have been considered as if there were insurance, said:

> "In such case there would be no question as to the right of the Government to recover damages for negligence, notwithstanding its insurance. The insurance company, if it paid the policy, would be entitled to subrogation to the rights of the Government to recover damages from the shipbuilding company (see *Liverpool, etc. Co. v. Phenix Insurance Co.,* 129 U. S. 397, 463, 9 S. Ct. 469, 32 L. Ed. 788; *Inman v. S. C. Ry. Co.,* 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612, and *Luckenbach v. W. J. McGahan Sugar Refining Co.,* 248 U. S. 139, 148, 39 S. Ct. 63, ... L. Ed. 171, 1 A.L.R. 1522); but under no possible theory would the shipbuilding company have any right against the insurance company."

In the *S. J. Brice* case, supra, there was no demise and there was also an express agreement that the

owner of the barge insure it and the hirer was to pay for such insurance. We have no such agreement in our case.

Appellees also cite *Hall-Scott Motor Car Co. v. Universal Ins. Co.,* 122 Fed. (2d) 531, 538 (9 C.C.A.), on the point that appellees were to have the benefit of insurance, (not that appellant assumed the risk of loss). The basis of that decision was that there was an express agreement releasing the motor car company from *all* liability, and that a bailee can contract to relieve itself of all liability.

We believe that *Kennelly v. Frederick Starr Contracting Co.,* 250 Fed. 299 (2 C.C.A.), and *White v. Upper Hudson Stove Co.,* 248 Fed. 893 (2 C.C.A.), are directly in point. In the *Kennelly* case there was an agreement by the charterer to procure and pay for extra insurance, if the boat was taken into certain waters, and in the *White* case there was also an agreement for the charterer to procure and pay for extra insurance. The situation in these cases made a stronger case for the charterer than appellees have made out, and yet the Court held the charterer liable for its negligence.

The mere fact that appellant had insurance does not warrant the inference that it thereby *assumed the risk of loss by fire.* None of the cases cited by appellees so hold. In *Hall-Scott Motor Co. v. Universal Insurance Co.,* supra, it will be noted that the Court was construing the agreement to release the motor company from all liability, and in the *Newport News* case, supra, the Court was taking into consideration

the bid, and the admission of the U. S. that the agreement to carry insurance meant that it was for the benefit of the shipyard.

Since appellees have urged the benefit of insurance, and estoppel as defenses, they must establish them. The burden is on appellees who claim that the insurance was for their benefit.

It is submitted that appellees have not sustained the burden which they assumed in their pleadings. The appellees raised the question of, "benefit of insurance", and, "estoppel". These defenses were abandoned and they now urge, "assumption of risk". The cases cited do not sustain their theories, and we feel that there has been no proof of either, "benefit of insurance", "estoppel" or "assumption of risk".

5. THE ORAL AGREEMENT WAS A DEMISE CHARTER AND THE FIREMAN WESTALL WAS APPELLEES' EMPLOYEE.

Appellees contend that the barge was operated under an agreement for services and not under a demise. The principal point urged is that the fireman, Westall, admittedly the only person on the barge at the start of the fire, and the engineer, Williams, were the employees of appellant. To establish this fact they rely on directly contradicted testimony that after the original oral agreement, the parties agreed that appellees were to furnish a crew *for* appellant, and that pursuant thereto, appellees did furnish an engineer and fireman *for* appellant.

However, in order to determine the status of the parties in relation to the barge,

> "The essential thing is to construe the agreement correctly in connection with the actions of the parties thereunder."
>
> *United States v. Shea,* 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403.

Applying this rule to our case, we find that appellant towed the barge to the scene where it was to be used and also towed it away after the fire. This is undisputed. Appellees took an engineer, Williams, and a fireman, Westall, from a derrick barge owned by appelles and instructed them to work on appellant's derrick barge. (Ap. 172.) These two men did go to work on the barge, and worked there for three days prior to the fire. They also worked on the day of the fire.

Mr. Ralph Foy, representing appellant, was present when the barge was delivered to appellees' job, and instructed the fireman, Westall, as to the position of the valves, the method of firing up, and greasing. (Ap. 142.) Ralph Foy then left and did not return until after the fire. (Ap. 46.) From the time Ralph Foy left, no one representing appellant had anything to do with the barge, unless the Court accepts appellees' theory that they furnished the engineer and fireman *for* appellant.

Under the agreement, appellees were to pay the wages of the engineer and fireman and charge them back against the rental. This they did with one excep-

tion—the day of the fire appellees paid these men but did *not* charge these wages back. (Ap. 94.) If these men were employees of appellant, why did not appellees make a charge for the wages paid them on May 21, 1941, the day of the fire? Appellees paid the engineer $6.60 and the fireman $6.40 for the 21st. (Ap-190.) The answer is apparent—the engineer and fireman were appellees' employees and under the agreement they were to be allowed a credit for their wages *only when the barge was being used at the agreed rental of $10.00 an hour.*

Appellees stress the testimony of Mr. Lauritzen and Mr. Kitchen, representing appellees, that the first they knew that the appellant would not furnish a crew was the night the barge arrived—on May 15th. (Ap. 198.) Is it reasonable to assume, as we must if this be true, that appellant would tow the barge up the Napa River to appellees' job without first notifying them that appellees would have to furnish the crew? Is not Captain Foy's account that he had told Mr. Lauritzen he could not furnish a crew and that Lauritzen said he had a crew—more consistent with what actually took place?

The fireman himself said that he worked on the barge for appellees the night the barge came in, and that appellees told him "the next day Foy's man would be there * * * to show me how to fire the rig". (Ap. 69.) At no time did the fireman state that he was supposed to work for appellant, although Mr. Lauritzen said he had so told the fireman.

It should also be noted that appellant's bill to appellees was for, "*rental* on Derrick Foy #2" (Ap. 93) and that appellees' bill to appellant for wages paid stated, "to be deducted from *rental* of derrick". (Emphasis ours.) (Ap. 94.) Also, in their letter of May 29 to appellant, appellees again referred to the, "rental" of the barge. (Ap. 89.) This bill also refers to, "the services" of engineer and fireman on the barge. This is not a bill for moneys advanced for appellant, but was for the services of the engineer and fireman which appellees had furnished under the terms of the agreement. (Ap. 94.)

In *United States v. Shea,* supra, it is said that the test as to whether an agreement amounts to a demise is management and control, and that, "the transfer of the exclusive possession, management and control", constitutes a demise.

Appellees apparently do not dispute this, but claim that the fireman Westall was the employee of appellant.

Let us assemble the pertinent facts:

1. The engineer and fireman were in the employ of appellees immediately prior to the time they went to work on the barge. (Ap. 172.)
2. The fireman Westall testified that he worked for appellees at the time of the fire (Ap. 43, 69); that they were his "bosses". (Ap. 44.)
3. The time cards of appellees indicate that from 8 to 12 of their men were employed on the barge. (Ap. 188, 190, 192.)

4. Said time cards also indicate that appellees paid rent for time spent in rigging (3 hours on May 16th). (Ap. 188.)
5. The time card for May 21st (Ap. 190), the day of the fire, indicates appellees paid wages to the fireman Westall and the engineer. No claim for credit was made because the barge was not working (Ap. 94) and therefore no rent was due.
6. Appellees repaired and overhauled the barge at their own expense. (Ap. 202.)
7. Appellees' superintendent locked up the crew's quarters on the barge, because "there was equipment in there we didn't want stolen, taken out, that we would have had to replace had it been lost". (Ap. 204-205.) The equipment consisted of dishes, butane stove, cooking utensils, bedding (Ap. 206), a part of the equipment of the barge.
8. Appellees' superintendent was in charge of driving sheet piling, which the barge was doing; he told the foreman who stayed with the barge on his shift what to do; he had the barge pumped out. (Ap. 214.)

Under the agreement, payment for the barge was to be made only for the time it was used and it was to be used as determined by appellees. Appellant could not know when the barge was used except for appellees to tell them. To construe the agreement as one for services would mean that appellant would have to keep a crew available at all times in order to have the barge available for use when appellees wanted to use

it. It cannot be conceived that appellant would have kept a crew idle, paying them their wages as employees and receive as revenue $10.00 an hour only for such time as the barge was in operation. That Mr. Lauritzen, one of the appellees, was conscious of the fact that he was responsible for the barge and that the fireman Westall was his employee is indicated by his admission that he was worried about the insurance company suing him on a subrogation claim. (Ap. 175.)

The barge, being without motive power, the only way it could be moved was to use some outside source of power. It is admitted that appellant towed the barge to the general location where it was to be used and also had it towed away, but while it was in operation apparently the barge was moved by appellees and this necessarily had to be from some outside source of power. Mr. Kitchen, appellees' superintendent, testified that they had to keep the barge pumped out because otherwise it would draw too much water in moving. (Ap. 200.) This also evidences the fact that appellees were in possession, control and management of the barge.

That the agreement constituted a demise and that the fireman was appellees' employee is indicated by all the acts of the parties under the agreement, and as was said before, these acts must be taken into consideration along with the agreement in determining what the actual situation was at the time of the fire.

6. THE DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE FIREMAN.

Appellant does not dispute the rule of law that the burden of proof to show negligence in a demise, such as this one, is on appellant. However, in such a demise where the barge is returned in a damaged condition, the damage occurring while the barge was in the control and possession of appellees, it becomes appellees' duty to explain how the damage occurred. (*Kohlsaat v. Parkersburg & Marietta Sand Co.,* 266 Fed. 283, 285 (4 C.C.A.), and *Commercial Molasses Corp. v. New York Tank Barge Corp.,* 314 U. S. 104, 110, 86 L. Ed. 89, 95.)

It is admitted that the barge was returned to appellant by appellees in a damaged condition and therefore it is the duty of appellees to show the cause of the loss and to show that it was not one involving their liability.

It is submitted that not only did appellees fail to explain how the fire occurred, but that appellant has conclusively shown that the damage to the barge was caused by the negligence of the fireman Westall.

Could it be denied that it would be negligence to leave a 3-year-old child playing with matches in a room filled with excelsior? Could it be denied that it would be negligence to leave an unattended bonfire in the midst of a forest? The negligence in our case is just as simple as that.

The stoppage of fuel occurring shortly after starting a fire in a boiler is not uncommon. So testified Mr.

Foss, Business Manager of Local 3 of Operating Engineers (Ap. 121), and the fireman Westall himself, who testified that it was not uncommon to have this happen. (Ap. 52.) Westall also testified that if a fireman were in attendance he could turn the fuel off when this happened and there would be no damage. (Ap. 52.) The fireman also admitted that he had told Mr. Foy and others that it, "was not good practice to go off and leave the fire alone and that he should have put out the fire when he decided to go to the toilet". (Ap. 55.) Also, the witness Ralph Foy testified, without objection, that the fireman Westall had told him it was negligence on the fireman's part to go away and leave the fire at the time he did (Ap. 141), and Westall himself testified that it was better practice not to leave the fire while it was generating, which was the case here. (Ap. 55.)

Even Mr. Kitchen, superintendent for appellees, admitted that it was not good practice to go out of the room in which the fire box was located unless you were in sight of the stack. The fireman Westall testified that he went to the stern of the barge to go to the toilet (Ap. 49), and this toilet was installed in the aft part of a living room of a "house" located on the stern end of the barge. (Ap. 131.) The fire room was located a little aft of midship of the barge and it was completely enclosed. Aft of the fire room was a water tank about 9 feet high. (Ap. 130.) It is self evident that if the fireman were at the toilet located inside this "house" he couldn't have seen the stack. It would

have been possible to have seen the stack if he had been outside the "house or cabin". (Ap. 153.)

We should also bear in mind that the equipment worked perfectly on May 16th, May 19th and May 20th, as the fireman stated that he had had no previous trouble with the boiler. (Ap. 210.) The fireman also testified that the boiler had worked perfectly the previous day. (Ap. 47.)

In evaluating the testimony of Mr. Lauritzen and Mr. Kitchen on behalf of appellees it should be pointed out that neither of them, although they profess to have had a great deal of experience with steam boilers, was familiar with Boiler Safety Order No. 850 of the California Industrial Accident Commission, which order provided that no boiler in active service should be left unattended. It would seem that a witness who presumes to testify as to methods of starting steam boilers should at least be familiar with this safety rule.

The proximate cause of the damage was not the fact that the fire started but that the fireman negligently left the fire when it was about to go out and caused the burning of the barge.

Appellees claim that the fire was due to the fact that the barge was not in good working condition. They then go into the realm of conjecture as to what might have caused the start of the fire. They don't know but offer various possibilities.

The Court itself was in doubt as to the cause of the start of the fire (Finding V, Ap. 228-229) finding that an explosion occurred, "due to * * * the failure

of the equipment of the barge to function properly, or by reason of defective fuel oil".

The Court also found (Finding V, supra) that the fuel line was not equipped with a strainer, but there was no testimony that a strainer would have prevented the fire or that the lack thereof in any manner contributed to the start of the fire. As a matter of fact, a strainer in the line would increase the probabilities of temporary stoppage.

The fact remains that the fire started during the generating period and that it is not unusual for a fire, during the generating period to stop. The fireman's theory was that, for some reason, the oil ceased to flow, and when it came on again, "the heat caused it to vaporize and spontaneous combustion ignited it". (Ap. 212.) He admitted that this was not unusual and that he should have been in attendance. He also stated that it was a simple matter to shut off the fuel if a stoppage of fuel occurred. (Ap. 52.) He had had this experience before and it was not an uncommon one. (Ap. 52.) The witness, Henry Foss, a man with 35 years' experience firing steam boilers, testified that he had had many backfires on boilers and had never lost any equipment because he was present to take care of the situation. (Ap. 125.)

Appellees intimate that the line between the tank containing the diesel oil and the burner was made of rubber. There is absolutely no testimony to that fact. Appellees also argue that the oil must have been dirty, but the fact is that the barge was operated for three days prior to the fire, and appellant could argue with

equal force that foreign substances, if any, in the fuel got there during that time.

In any event it seems perfectly clear that the loss was proximately caused by the failure of the fireman to be in attendance on the boiler at a time when there was a possibility that the fire might go out. Appellees do not profess to know what started the fire and we believe this is relatively unimportant. The proximate cause of the damage was not the original fire that started, but the negligence of the fireman in not being there to turn off the generating oil when the flame went out and in not being there to put the fire out when it did start.

CONCLUSION.

Appellant respectfully submits that:

1. The agreement under which the barge was operated was a demise charter.

2. The fireman Westall was the employee of appellees.

3. Appellees do not have the benefit of insurance nor is appellant estopped.

4. Appellant did not assume the risk of loss.

5. This is a simple case of a bailee's negligent loss, occasioned by the abandonment of the boiler by their fireman, Westall, while temporarily firing up with light, highly inflammable fuel—that this is the real issue is only slightly fogged by the multitude of defenses urged by appellees.

6. The decree be reversed, and the cause remanded to the trial Court for the trial of the issue of damages.

Dated, Stockton, California,
January 2, 1945.

DARRAH & ELLIS,
GUARD C. DARRAH,
AGLER B. ELLIS,
SINGLE, BRYANT, COOK AND HERRINGTON,
Proctors for Appellant.

No. 10690

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLINTON B. McELHENY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division

FILED
APR 25 1944
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 590 Folsom St., San Francisco

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Appeal:

Certificate of Clerk to Transcript of Record on 106

Notice of 18

Order for Transfer of Exhibits 105

Statement of Points and Designation of Record on 107

Assignments of Error 20

Bill of Exceptions 44

Certificate of Judge Settling and Allowing 104

Exhibit for Defendant:

K—(Iden.) Permit dated Oct. 8, 1943, issued to T. E. Dudley by R. G. James 94

Exhibits for the United States:

10—Statement of Clinton B. McElheny, Nov. 24, 1943 55

11—Statement of Clinton B. McElheny, Nov. 29, 1943 58

Index Page

Witnesses for Defendant:

Dudley, Thomas E.
—direct 93

McElheny, Clinton B.
—direct 62, 69
—voir dire 68
—cross 86
—redirect 92
—recross 93

Witnesses for the United States:

Chandler, Arthur
—direct 45
—cross 46
—rebuttal, direct 99
—cross 99

Hubbs, Max V.
—direct 52
—cross 53, 56
—redirect 57
—recross 57

Moehle, Walter E.
—direct 57
—voir dire 58

Park, Warren Wilford
—direct 47
—cross 51

Certificate of Clerk to Record on Appeal 106

Index

Page

Designation of Record, Statement of Points and 107

Indictment 2

Judgment 16

Minutes of Court:

Jan 12, 1944—Plea of Not Guilty 11

Feb. 16, 1944—Trial 12

Feb. 17, 1944—Further Trial 14

Feb. 18, 1944—Further Trial 15

Motion for New Trial 101

Names and Addresses of Attorneys of Record.. 1

Notice of Appeal 18

Order for Transfer of Exhibits 105

Sentence 103

Statement of Points on Appeal and Designation of Record 107

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In the Northern Division of the United States District Court for the Northern District of California

INDICTMENT

First Count: (T. 18 USCA, 82)

In the October 1943 term of said Division of said District Court, the Grand Jurors thereof, on their oaths present: That

CLINTON B. McELHENY

hereinafter called said defendant, heretofore, to-wit, on or about the 1st day of January, 1942, at the Sacramento Air Depot, McClellan Field, in the County of Sacramento, within the Northern Division of the Northern District of California, and within the jurisdiction of this Court then and there being, did feloniously, knowingly, wilfully and unlawfully take and carry away for his own use, with intent then and there had by said defendant to steal and purloin the same, personal property of the United States, said personal property being more particularly described as follows:

CLASS 17-B

	Approximate Value
1 Clamp "C" light service, 1¼"	.10
3 Countersink steel, S.S. ⅝" body, ¼" shank, 80° incl, angle	2.28
2 Countersink steel, S. S. ⅝" body, ½" shank 82° ditto	1.52
1 Countersink steel, S. S. ¾" body, ½" shank, 54° ditto	.78
1 Countersink steel, S. S. ¾" body, ½" shank, 60° ditto	.88
1 Countersink steel, S. S. ¾" body, ½" shank, 78° ditto	1.40
1 Die & collet 10 - 32, 2" O.D	1.00
1 Die & collet ¼ - 28, 2" O.D	1.20

		Approximate Value
1	Die & collet 3/8 - 16, 2" O.D.	1.35
1	Die & collet 5/16 - 24, 2" O.D.	1.20
1	Die & collet 1/2" 20, 2 - 3/4" O.D.	1.75
1	Die & collet 5/8 - 11, 2 - 3/4" O.D.	1.95
1	Die & collet 3/4 - 16, 2 - 3/4" O.D.	2.20
1	Die & collet 1/2 - 13, 2 - 3/4" O.D.	1.75
1	Drill, twist straight shank No. 5, H.S.	.24
1	Drill, twist straight shank, Letter A"H.S.	.25
8	Drill, twist straight shank, No. 1D H.S.	1.68
2	Drill, ditto 14	.40
2	Drill, ditto 22	.34
4	Drill, ditto 24	.64
1	Drill, ditto 8	.22
		[1*]
3	Drill, ditto 15	.60
4	Drill, ditto 16	.76
1	Drill, ditto 29	.14
2	Drill, ditto 20	.34
1	Drill, ditto 23	.16
3	Drill, ditto 28	.42
3	Drill, ditto 21	.51
2	Drill, ditto 26	.32
1	Drill, ditto 25	.16
1	Drill, ditto 22	.17
4	Drill, ditto 30	.56
2	Drill, ditto 33	.26
2	Drill, ditto 27	.32
3	Drill, ditto 38	.36
1	Drill, ditto 13/64 H.S.	.21
1	Drill, ditto 5/32	.17
1	Drill, ditto 9/16"	1.33
1	Drill, ditto 33/64"	.90
1	Drill, ditto 17/64"	3.50
1	Drill, ditto 7	.22
3	Drill, ditto 18	.57
1	Drill, ditto Letter C	.26
1	Drill, ditto E	.27
5	Drill, ditto 15/64 H.S.	1.15

*Page numbering appearing at foot of page of original certified Transcript of Record.

		Approximate Value
6	Drill, ditto 7/32	1.38
1	Drill, ditto 19/64″	.36
2	Drill, ditto No. 1	.52
4	Drill, ditto 4	1.00
3	Drill, twist, straight shank No. 6 H.S.	.72
2	Drill, ditto 3	.52
2	Drill, ditto 9	.44
1	Drill, ditto 3/16	.19
2	Drill, ditto No. 12	.42
3	Drill, ditto 13	.60
2	Drill, ditto 2	.52
1	Brush, steel wire, 1½″ dia. Osborn 68	.56
1	Drill, twist, straight shank No. 34 HS	.12
1	Drill, ditto 35	.11
4	Drill, ditto 40	.40
1	Drill, ditto 31	.12
3	Drill, ditto 39	.33
1	Drill, ditto 41	.11
1	Drill, ditto 37	.11
1	Drill, ditto 49	.09
1	Drill, ditto 44	.09
1	Drill, ditto ½″ H.S.	.97
2	Drill, ditto 9/32″	.66
5	Drill, ditto 19/64″	1.80
2	Drill, ditto No. 12	.38
8	Drill, ditto 10	1.52
5	Drill, ditto 28	.65
4	Drill, ditto 53	.36
9	Drill, ditto 46	.81
1	Drill, ditto 11	.19
1	Drill, ditto extension ⅛″ H.S.	.14
1	Drill, ditto ditto 5/32″	.17
2	Drill, ditto ditto 3/16″	.38
2	Drill, star, ½	.22
1	Drill, star, ¾	.19
1	Drill & countersink 3/10 x 3/10 x 1/8	.30
1	Drill, ditto 7/16 x 3/16 x 3/16″	.45
		[2]
1	Extractor, screw ezy-out, #1	.15
2	Extractor, ditto #2	.34
3	Extractor, ditto #3	.54

		Approximate Value
2	Extractor, ditto #4	.48
2	Extractor, ditto #5	.56
1	Extractor, ditto #6	.28
1	File, flat, smooth, 8″	.20
1	File, square, smooth, 6″	.12
2	File, ditto 10″	.25
1	File, vixon, flat 10″	.93
1	File, flat, smooth, 12″	.36
1	File, flat, bastard, 12″	.15
1	File, half round, smooth, 10″	.33
1	File, ditto	.14
1	File, warding, bastard, 8″	.14
1	File, flat bastard, 6″	.13
1	Knife, bastard, 12″	.32
1	File, half round bastard, 6″	.18
2	File, round bastard, 6″	.20
1	File, round bastard, 8″	.12
2	File, round smooth, 6″	.20
1	File, square, bastard, 8″	.12
1	File, three square, smooth, 6″	.15
2	File, Swiss pattern, square	.36
3	File, ditto oval	.57
3	File, ditto flat	.57
3	File, ditto half round	.57
1	set Figures, stamping gothic 1/16″ O-9	4.50
1	Handle, socket wrench, hinge ⅜″ sz. dr.	.92
1	Head, center, 12″ combination set	.75
1	Head, protractor, 12″ combination set	2.52
1	Blade, combination square	.60
1	Chisel, diamond point, ¼″ cutting edge	.19
1	Joint, socket wrench, universal, ⅜″ sq. dr. 1 male & female	.51
1	set Letters, stamping gothic 1/16″ A-Z	1.50
4	Handle, file, wood, medium	.20
1	File, rotary, round pointed	1.50
1	File, ditto	1.50
1	Extractor, screw, ezy-out #3	.17
2	Punch, drift pin, 1/16″	.60
1	Punch, ditto 3/32″	.18
3	Punch, ditto 1/4″	.90
3	Punch, ditto 5/32″	.63

		Approximate Value
1	Punch, ditto 1/8″	.18
5	Punch, ditto 7/32″	1.20
4	Punch, center 5/16″	1.00
6	Tap, hand, taper 6-36	4.98
2	Punch, center spacing (Starrett)	1.40
1	Tap, hand, taper 4-40	.83
3	Tap, ditto 6-40	2.49
7	Tap, ditto 6-32	5.81
5	Tap, ditto 8-32	4.15
3	Tap, ditto 8-36	2.49
14	Tap, ditto 10-32	12.04
9	Tap, ditto 10-24	7.74
1	Tap, ditto 1/4-28	.72
1	Tap, hand, plug 7/16-20	1.35
2	Tap, hand, pipe, taper 1/8-27	.28
1	Tap, hand taper 5/16-18	.71
1	Tap, hand, plug, 7/16-14	.86
1	Tap, hand, taper 5/16″-18	.71
		[3]
1	Tap, hand, plug ½-20	1.16
1	Pump, Lehman Bros., size 26 #15229	
1	Torch, welding smith #2 complete with tips	20.44
2	Wheel, buffing, tampico, 8″	.86
1	Wheel, abrasive, straight 8 x ¾ x ½	1.51
1	Tool, flaring comb., 3/16″ 1/16 - 5/8″	2.25
1	Shears, metal cutting compound leverage, right cut, 1¼″	2.13
2	Scriber, machinists double point, 9″	.66
1	Saw, circular, metal slitting, 1½″ dia. 3/32″ thick, ½″ hole	2.24
1	Saw, circular, ditto 2¾ dia. 1/16″ thick 1″ hole	1.98
1	Saw, ditto 5/16″ thick 1″ hole	1.15
1	Saw, ditto 1/32″ thick 1″ hole	1.15
1	Wrench, adj. jaw, single end, 8″	.61
1	Wrench, ditto 10″	.77
1	Wrench, adj. auto, 10″	.80
1	Wrench, OE., D.H. 5° angle 5/16″ x 13/32″ M.O	.14
2	Pliers, diagonal cutting, 6″	.88
1	Tape, measuring, steel 50 ft.	3.56
1	Shears, metal cutting, compound leverage 1¼″ cut approx., left cut	2.13

		Approximate Value
2	Saw, circular, metal slitting, 3″ dia. 1/32″ thick 1″ hole HS	3.96
1	Saw, circular, ditto 2¾″ dia. .040 thick x 1″ hole	1.15
3	Saw, circular, ditto, 3″ dia. 3 3/32 thick 1″ hole HS	6.12
3	Saw, circular, ditto 3″ dia. ⅛″ thick 1″ hole HS	8.40
2	Reamer, taper pin #3/o	3.24
1	Reamer, ditto #2/o	1.62
4	Reamer, ditto #0	6.44
1	Reamer, ditto #1	1.80
5	Reamer, ditto #2	9.90
6	Reamer, ditto #3	12.96
3	Reamer, ditto #4	7.56
1	Reamer, ditto #5	2.70
3	Reamer, hand 3/16″ HS	4.68
1	Reamer, hand 13/64″ HS	2.12
1	Reamer, hand 15/64″ HS	2.12
1	Socket, 12 point, ⅜″ sq. dr. 5/16″ BO	.13
1	Socket, ditto 7/16″	.13
1	Socket, ditto ½″	.13
1	Socket, ditto ¾″	.15
1	Socket, universal, 12 point, ⅜″ sq. dr. ½″ BO	.50
1	Socket, ditto ¾″ BO	.55

CLASS 03-K

1	Gage, oxygen, AD-2215	2.15

CLASS 05-C

1	Gage, altitude type B-10	15.80

CLASS 08

1	Cord, extension, 2 plug	1.50

[4]

CLASS 29

1	Wrap lock	.60
1	Padlock Master #6	6.60
1	Padlock Huro	.70
1	Padlock Olco	.80

of the total approximate value of $279.20

said defendant then and there well knowing that said personal property was then and there the property of the United States of America.

Second Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, certain personal property of the United States, said property being more particularly described under Class 17-B in the first count of this indictment (reference to which description is hereby made and the same by reference incorporated herein with the same force and effect as though fully set forth), said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Third Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his posses-

sion with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as One Gage, oxygen, Ad-2215, Class 03-K, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America. [5]

Fourth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Gage, altitude type B-10 Class 05-C, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Fifth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern

District of California and within the jurisdiction of this Court, did then and there unlawfully, knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Cord, extension, 2 plug Class 08, said defendant then and there well knowing that said personal property had theretofore been stolen from and was then and there the property of the United States of America.

Sixth Count: (T. 18 USCA, 101)

And the said Grand Jurors, upon their oaths aforesaid, do further present: That the said defendant, on or about the 24th day of November, 1943, in the City of Sacramento, County of Sacramento, in the Northern Division of the Northern District of California and within the jurisdiction of this Court, did then and there unlawfully, [6] knowingly, wilfully and feloniously have in his possession with intent to convert to his own use or gain, personal property of the United States, said personal property being more particularly described as one Wrap lock, one Padlock Master #6, one Padlock Huro, and one Padlock Olco Class 29, said defendant then and there well knowing that said personal property had theretofore

been stolen from and was then and there the property of the United States of America.

FRANK J. HENNESSY
United States Attorney
By EMMETT J. SEAWELL
Assistant United States Attorney

[Endorsed]: A True Bill. John W. Geeslin, Foreman Grand Jury.

[Endorsed]: Filed Jan 7 1944. C. W. Calbreath, Clerk. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 12th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

UNITED STATES

vs.

CLINTON B. McELHENY

PLEA OF NOT GUILTY

This case came on this day ex-parte. The defendant was present in Court in custody of the U. S.

Marshal, having been produced by the U. S. Marshal upon a bench warrant hertofore issued, and with Charles L. Gilmore, Esq., his Attorney; and, on motion of Thomas O'Hara, Assistant U. S. Attorney, was called for arraignment. The defendant was informed of the return of the Indictment and asked if he was the person named therein; and, upon his answer that he was, and that his true name was as charged, thereupon waived the reading of the Indictment. The defendant was called to plead, and thereupon plead Not Guilty to the Indictment, which said plea was Ordered entered. The defendant and attorneys for both parties, in Open Court, orally waived trial by Jury. Ordered this case be continued to January 18, 1944, to be set for trial. [8]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 16th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

TRIAL

This case came on regularly this day for trial before the Court sitting without a jury, a trial by

jury having been heretofore orally waived in Open Court by the defendant and the attorneys. The defendant Clinton B. McElheny was present in Court with Charles L. Gilmore, Esq., his Attorney. Emmet J. Seawell, Assistant U. S. Attorney, was present for and on behalf of the United States. Arthur E. Chandler, Warren M. Parker, Max V. Hobbs and Walter E. Moehle were sworn and testified for and on behalf of the United States. Mr. Seawell introduced in evidence and filed U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, and introduced for identification U. S. Exhibit No. 1, and the United States rested. Clinton B. McElheny was sworn and testified for and on behalf of the defendant. Mr. Gilmore introduced in evidence and filed defendant's Exhibits Nos. A, B and C. Ordered that the further trial hereof be continued until February 17, 1944, at 10 o'clock a.m. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 17th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

FURTHER TRIAL

The attorneys hereto and the defendant herein being present as heretofore, the further trial hereof was thereupon resumed. Clinton B. McElheny was recalled and Thomas E. Dudley was sworn and testified for and on behalf of the defendant. Mr. Gilmore introduced in evidence and filed defendant's Exhibits Nos. D, E, F, G, H, I and J, and introduced for identification defendant's Exhibit No. K, and the defendant rested. Arthur E. Chandler was recalled and testified for and on behalf of the United States, and the United States rested. Thereupon the evidence was closed. After argument by Mr. Gilmore to the Court, it is Ordered that this case be and the same is hereby continued until February 18, 1944, at 1:30 o'clock p.m. [10]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 18th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge.

No. 8637

[Title of Cause.]

FURTHER TRIAL

The attorneys and the defendant being present as heretofore, the further trial of this case was thereupon resumed. After argument by Mr. Seawell, the case was submitted to the Court for consideration and decision, and the same being fully considered, it is Ordered that the defendant be and he is hereby adjudged Guilty on the First Count of the Indictment. On motion of Mr. Gilmore, and with the consent of Mr. Seawell, it is Ordered that Counts 2, 3, 4, 5, and 6 be and they are hereby dismissed. Mr. Gilmore made a motion for a new trial, which said motion was Ordered denied. The defendant was called for judgment, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court Ordered And Adjudged that the defendant, having been found Guilty of said offenses, is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for the period of One (1) Year in a County Jail, and that judgment be entered herein accordingly. It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer and that the same shall serve as the commitment herein. It is further Ordered that the bond heretofore given herein for the appearance of the defendant herein, be and the same is hereby exonerated and sureties thereon discharged. **[11]**

District Court of the United States, Northern District of California—Northern Division

UNITED STATES

vs.

CLINTON B. McELHENY

No. 8637—Criminal Indictment in Six counts for violation of U. S. C., Title 18 Secs. 82, 101 (Theft and possession of Government property)

JUDGMENT AND COMMITMENT

On this 18th day of February, 1944, came the United States Attorney, and the defendant Clinton B. McElheny appearing in proper person, and by counsel, and

The defendant having been adjudged guilty by the Court of the offenses charged in the 1st Count of the Indictment in the above-entitled cause, to-wit:

On or about the 1st day of January, 1942, at the Sacramento Air Depot, McClellan Field, California, defendant did feloniously and unlawfully take and carry away for his own use, personal property of the United States, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) year

It Is Further Ordered that Counts 2, 3, 4, 5 and 6 of the Indictment, be and the same are hereby dismissed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:
EMMET J. SEAWELL
Assistant U. S. Attorney
(Signed) MARTIN I. WELSH
United States District Judge.

The Court recommends commitment to County Jail.

[Endorsed]: Entered and filed this 18th day of February, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Clinton B. McElheny, Route 1, Box 574, Fair Oaks, California.

Name and address of appellant's attorney: Chas. L. Gilmore, 303 Capital National Bank Bldg., Sacramento, (14), California.

Offense: Taking and carrying away with intent to steal personal property of the United States (18 U.S.C.A. Sec. 82).

Date of Judgment: February 18, 1944.

Brief description of judgment or sentence: Guilty of first count of indictment; not guilty of 2nd, 3rd, 4th, 5th and 6th counts and the same were dismissed; sentenced to One (1) year in County Jail on first count.

Name of prison where now confined: Temporarily in County Jail at Sacramento. Motion to admit to bail pending appeal denied by trial court.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

Dated: February 21, 1944.

CLINTON B. McELHENY
Appellant.

GROUNDS OF APPEAL

1. That the Court erred in law by which the substantial rights of defendant were affected, and

which prevented defendant from having a fair trial, in this:

(a) In accepting and allowing in evidence, purported confessions of defendant in violation of defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; [13]

(b) In refusing to allow or permit defendant to show the laws, rules and regulations of the United States Army governing McClellan Field, under which defendant was employed;

(c) In refusing to allow or permit defendant to present written evidence termed "memorandum receipts" and "passes", to establish that all tools set forth and described in said indictment came lawfully into his possession and for which he was required to account or pay for under the rules and regulations promulgated by the United States Army;

(d) In refusing to allow or permit defendant to present written receipts issued by the Army Command of McClellan Field showing payment to have been made for a large part of the items set forth in said indictment, which canceled memorandum receipts evidencing deductions from pay for other items named, and money receipts showing payment for the remainder, all having been delivered and paid in accordance with the rules and regulations of the United States Army;

(e) In refusing to allow or permit defendant to prove that tools and equipment are allowed and permitted by the United States Army in command

at McClellan Field to be taken from said field by civilian employees;

(f) In refusing to give consideration to the doctrine of reasonable doubt in determining the guilt of defendant;

(g) In refusing to consider or recognize the Articles of War and in particular Article 2 and Section 80 thereof;

(h) In presuming from the mere fact of possession that the articles named in the indictment were stolen by defendant, while adjudging defendant not guilty of possession.

(i) In presuming from the mere fact of possession that defendant took said articles and each of them with intent to steal and purloin the same

CHAS. L. GILMORE
Attorney for Defendant

Due service by copy of the within Notice of Motion admitted this 21st day of February, 1944.

FRANK J. HENNESSY
EMMET J. SEAWELL
Attorneys for Plaintiff

[Endorsed]: Filed Feb 21 1944. [14]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now comes the defendant, Clinton B. McElheny, by his Attorney, and says that in the proceeding

herein, and in the orders and judgment entered, there are manifest errors, to-wit:

ASSIGNMENT OF ERROR No. 1

The Court erred in admitting Government's Exhibit No. 2, (10-inch steel wrench):

The testimony of Witness Parker was substantially that wrenches similar to that are bought by contract from Wright Field which is the main depot for buying Army property and tools of this type, but not all tools, are marked "U. S. A." and this wrench is. (Bill of Exceptions, p. 11)

The reasons such Exhibit should not have been admitted are as follows:

1. It was hearsay testimony, and no proper identification of the Wrench that it had ever been at McClellan Field, was had by the witness.

2. It was admitted on the ground of similarity, alone.

ASSIGNMENT OF ERROR No. 2

The Court erred in admitting Government's Exhibit No. 3, (Padlock): [15]

The testimony of witness Parker was substantially that it has a number on it similar to the ones put on at McClellan Field, which they used a long time ago. I used to identify the padlocks at McClellan Field that way a long time ago. They don't use that type of padlock any more. (Bill of Exceptions P. 11.)

The reasons such exhibit should not have been admitted are as follows:

1. It was hearsay testimony and no proper identification was had.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 3

The Court erred in admitting Government's Exhibit No. 4, (Machinist's scriber):

The testimony of witness Parker was substantially that he identified it by the marks "U.S.A." and that is the way these articles are marked at McClellan Field. (Bill of Exceptions P. 11).

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification of the wrench that it had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

The Court erred in admitting U. S. Exhibit No. 5 (pliers.):

The testimony of witness Parker was substantially that he identified the pliers by the mark "U. S." on them and that all of that type they had in stock at McClellan Field are marked with "U. S." on them. (Bill of Exceptions, P. 11).

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification of the pliers that they had ever been at McClellan Field was had by the witness.

2. They were admitted on the ground of similarity alone. [16]

ASSIGNMENT OF ERROR No. 5

The Court erred in admitting U. E. Exhibit No. 6 (Steel Tape):

The testimony of witness Parker was substantially that he identified the tape as having "Air Corps, U. S. Army" on it and that is the way this type of tape is marked at McClellan Field. (Bill of Exceptions, p. 12).

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the tape had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 6.

The Court erred in admitting U. S. Exhibit No. 7 (Wrench):

The testimony of witness Parker was substantially that he identified the wrench as coming from McClellan Field for the reason it bore the marking "U. S. A." (Bill of Exceptions p. 12).

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the wrench had ever been at McClellan Field was had by the witness.

2. It was admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 7.

The Court erred in admitting U. S. Exhibit No. 8 (Pliers):

The testimony of witness Parker was substantially that he identified these pliers by the marking "U. S." on them and that there were similar pliers at McClellan Field. (Bill of Exceptions p. 12.)

The reasons such exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the pliers had ever been at McCellan Field was had by the witness.

2. They were admitted on the ground of similarity alone. **[17]**

ASSIGNMENT OF ERROR No. 8.

The Court erred in admitting U. S. Exhibit No. 9 (Miscellaneous lot of tools). (Bill of Exceptions, p. 12).

The testimony of witness Parker was substantially that he could identify the tools then in a paper bag as they were all marked "U. S. A.", and similar tools were at McClellan Field.

The reasons such Exhibit should not have been admitted are:

1. It was hearsay testimony and no proper identification that the tools had ever been at McClellan Field was had by the witness.

2. They were admitted on the ground of similarity alone.

ASSIGNMENT OF ERROR No. 9.

The Court erred in admitting U. S. Exhibit No. 10 (Statement of defendant taken by Lieutenant Ark—Bill of Exceptions, p. 15).

This statement is as follows:

"24 November 1943,
McClellan Field, California.

"I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths, without any threats, coercion or promises of any immunity, do hereby swear and affirm that the statement I am about to make is a true statement.

The only articles of government property I have or had in my possession off the reservation or had any knowledge of having were the articles that Mr. Arthur E. Chandler recovered from my home on November 23, 1943, with the exception of the following listed articles which I disposed of on the 21st of November, 1943:

"A. Three Oxygen Pressure Gauges.

"B. One dozen old files. [18]

"C. One and one-half of two pounds of bolts and nuts.

"D. One electrical plug.

"E. About one-half dozen pieces of 2 inch or 3 inch copper tubing.

"F. About one-half dozen copper tubing ¼ inch fittings.

"G. Three pronged electrical plug.

"H. One set of steel stencils.

"The only other exceptions to those listed above are those articles which were given to me on a pass to be taken from McClellan Field for my own personal use, and they are described as follows:

"1. Several hundred boiler tubes.

"2. Approximately 2500 feet of lumber.

"3. Approximately 300 feet of 3 by 3 by ⅛ formed angle steel.

"4. One boiler base.

"5. Two five gallon cans.

"6. Two alcohol barrels.

"7. Several lengths of flexible conduit.

"There are three pages to this statement."

Signed: "Clinton B. McElheny.

"Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A. C., Summary Court Officer."

The testimony in support of the statement was given by witness Sergeant Hubbs, substantially, that preliminary to the taking of this statement, defendant had been before the summary court, interviewed at length, had then gone to his home voluntarily, with witness Chandler, who previously testified such visit was made about 10 o'clock in the evening of November 23, and not on the 24th, and on the 24th some time after 10 o'clock P.M., defendant made the statement before Lieutenant Ark, Sergeant Hubbs, witness Chandler, and another investigator named Cecchettini. The statement shows on its face that defendant was advised the meeting

was a [19] summary court and that the defendant, as a civilian employee of the Field, was subject to its processes.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was hearsay evidence, did not contain all the evidence and statements obtained and made during the session of the summary court and was an extrajudicial confession obtained by trick and ruse, and without any foundation having been laid for its introduction.

2. Its nature was highly prejudicial to the defendant.

ASSIGNMENT OF ERROR No. 10.

The Court erred in admitting U. S. Exhibit No. 11, statement of defendant to F.B.I. agent Moehle, as follows: (Bill of Exceptions, p. 18.)

"Sacramento, California,
November 29, 1943.

"I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; and no threats or promises have been made to me. I know it may be used in court.

"I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division.

On or about December 15, 1941, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

"50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

"Most of these items were in various boxes at Sacramento Air [20] Depot and were materials charged out to me.

"I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating the federal law in so doing.

"I have read the above statement and say it is true."

Signed: "Clinton B. McElheny."

"Witnesses by: Walter E. Moehle, Special Agent, F. B. I., Sacramento, Calif., 11/29/43; Robert E. Coeke, Special Agent F. B. I., Sacramento, Calif., 11/29/43."

The testimony in support of the statement given by witness Moehle, is, in substance, as follows:

That witness invited defendant to come to his office in the postoffice building in Sacramento, which he did on November 29, 1943, and at that time defendant was not under arrest and was not put under arrest by witness. The list of tools attached to the statement was handed to witness by someone else. The tools were not in the office of witness at that time. (List is omitted from state-

ment as it is identical with list contained in first count of indictment). Witness did not state he advised defendant statement would be used against him in court or at all, nor that he was under no compulsion to make any statement.

The reasons such exhibit should not have been admitted are as follows:

1. That it was and is incompetent to prove any of the issues of this case.

2. That is was and is hearsay.

3. That it is in form an extrajudicial statement for which no foundation had been laid.

4. That it was highly prejudicial to defendant.

ASSIGNMENT OF ERROR No. 11.

The Court erred in admitting U. S. Exhibit No. 12, box of tools. (Bill of Exceptions, p. 21.) [21]

The testimony offered in support of the exhibit was stated by counsel for the plaintiff, to wit:

That the box contained tools claimed to have been found at defendant's home; that they were similar to tools used at McClellan Field; that they are the tools described in U. S. Exhibits Nos. 10 and 11. (Bill of Exceptions, p. 15 and 18.)

The reasons why such exhibit should not have been admitted are as follows:

1. There was no identification of any of the tools as having ever been at McClellan Field nor as ever been owned by or in the possession of the United States.

2. That the tools were admitted in evidence on

the ground they were similar to tools in use at McClellan Field, and therefore incompetent.

3. That no evidence independent of the extra-judicial confessions of defendant admitted over objection was introduced connecting the defendant with any of the tools in such exhibit.

4. That the court indulged in a presumption of guilt of defendant as the basis for introduction of said exhibit.

ASSIGNMENT OF ERROR No. 12.

The Court erred in sustaining objection on the grounds of incompetence, immateriality and irelevancy, to testimony of defendant in attempting to show the method and means provided by the Field to return tools upon transfer to another position on the Field.

The testimony on this point was substantially as follows:

That tools were issued to workmen, foremen and superintendents on memorandums by the Tool Room, and on "Form 81" from the Supply Division. If on memorandums, the employee was charged with them and if not accounted for, the value was deducted from his pay. If on Form 81 they were expendable and non-recoverable and these included the drills up to and including ¼ inch and small reamers. [22] This meant the foremen and superintendents obtained three or four dozen at a time and passed them out to the workmen as needed. If the foreman was transferred he had to account for tools on the memorandums and if any

were on hand issued on Form 81, he had to take care of them until he could turn them back in. That defendant was made Assistant Superintendent of Air Craft Shops and thereafter his work day averaged fourteen hours a day, and he had to work all three shifts. He had no place safe from theft to keep any tools he formerly had in his possession and had to take them home which he did in this case. That he had succeeded in clearing up his memorandums to a great extent with the exception of the small items charged against him in the indictment.

That he was asked by his counsel what means were provided at the Field for turning in tools charged against him. (Bill of Exceptions, p. 29.)

Whereupon counsel objected on the ground that the evidence was incompetent, irrelevant and immaterial and sustained by the court.

The reasons why such evidence and testimony should have been admitted were as follows:

1. Witness had already progressed along the line of showing the system established by the Army at the Field for issuing and accounting for tools, and he was entitled to complete the showing as establishing cause for alleged delay in getting these small items from his home to the Field.

2. That such showing was part of his defense in showing affirmatively, there was no intent on his part to violate any law.

3. That such evidence was competent to show his innocence of crime, although the burden was not upon him.

4. That it was relevant to the cause in which he was being tried.

5. That it was material as showing the absence of criminal intent and absence of guilt. [23]

ASSIGNMENT OF ERRORS No. 13.

The Court erred in sustaining objection to introduction in evidence of demand of McClellan Field against defendant in the sum of $61.24 to cover value of lost tools, which defendant received through the mails. (Bill of Exceptions, p. 33.)

The reasons why such evidence should have been admitted are:

1. That it was competent evidence to show the system at the Field under which employees were issued tools and if not returned, they paid for them.

2. That it was material in showing that the tools came lawfully into his possession.

3. That it was relevant to the issues as showing no intent of defendant to steal any tools.

4. That it was part of the system under which defendant worked and tended to show defendant merely followed the system with no thought of violating any law of the United States.

ASSIGNMENT OF ERROR No. 14.

The Court erred in sustaining objections to introduction in evidence of the following memorandum receipts issued by McClellan Field to defendant and listing tools contained in the indictment:

3 pages, dated Sept. 27, 1939; No. 42-293, dated Jan. 7, 1942; No. 42-3529, dated August 20, 1942;

No. 42-32912, dated June 2, 1942; No. 43-9620, dated Nov. 12, 1942; No. 42-32352, dated June 5, 1942; No. 43-18347, dated May 7, 1943; No. 44-15, dated Nov. 23, 1943; No. 44-3909, dated Nov. 29, 1943; No. 44-69, dated July 1, 1943; No. 43-6431, dated Sept. 26, 1943; No. 43-6564, dated Sept. 26, 1942. (Bill of Exceptions, pp. 33-35.)

The reasons why such memorandums should have been issued are:

1. They showed that all tools named in the indictment, other than those classified as expendable and non-recoverable and other than those owned by defendant, were regularly issued to defendant under the system used at McClellan Field, for which he was charged [24] and which he had paid for.

2. They were competent evidence to prove defendant was not guilty of stealing any of the tools.

3. They were material to his defense.

4. They were relevant to the issue of guilt or innocence of defendant.

ASSIGNMENT OF ERROR No. 15.

The Court erred in sustaining objection to admission of receipt No. E-N-3753, voucher 1-12-44 issued by the Field to defendant either in December, 1943, or January, 1944, showing payment of the sum of $52.92 for tools. (Bill of Exceptions, p. 35.)

The testimony of defendant regarding the voucher was substantially that before he could get his final check he had to pay for the tools listed

thereon and he made the payment either in December, 1943, or January, 1944. (Bill of Exceptions, p. 35.)

The reasons why the voucher should have been admitted are:

1. That it was part of the system in use at the Field.

2. That it was competent to show the innocence of defendant of either intent to steal or felonious possession of tools.

3. That it was relevant to the issue of guilt or innocence.

4. That it was material to the defense of both theft and possession.

ASSIGNMENT OF ERROR No. 16.

The Court erred in sustaining objection to testimony of defendant as to conversation had with Captain Pearce the day following the date of the alleged confession set forth under Assignment of Error No. 9, supra. (Bill of Exceptions, p. 38.)

The testimony of defendant was substantially that after the statement was obtained on November 24, 1943, Captain Pearce was brought in who stated he was the summary court martial officer, representing the Commanding Officer and who said he wished to take testimony. He asked defendant if defendant had a bank account, if [25] defendant knew the Government should not buy from a vendor, said defendant bought materials from vendors, which defendant stated he denied as his

only responsibility was recommending material be purchased. (Bill of Exceptions, p. 38.)

The reasons this testimony and evidence should have been admitted are:

1. It showed the extent of the grilling defendant received in the effort to obtain the so-called confession.

2. It established the fact that this defendant believed and was warranted in his belief that he was on November 25, 1943, still under court martial since its convening on the day previous.

3. It showed the so-called confession was obtained pursuant to third-degree methods.

4. It was competent to show the whole course of the investigation to which this defendant was subjected.

5. It was relevant and material to show the whole of this third-degree proceeding which plaintiff had opened up in its case in chief.

ASSIGNMENT OF ERROR No. 17.

The Court erred in striking out the testimony of plaintiff regarding being in custody of Mr. Chandler.

The defendant testified substantially that he was taken to the "Ark court-martial" by Chandler, that he was in the Chandler's custody all the time, that Chandler practically lived with him during that time. (Bill of Exceptions, p. 39.)

The reasons why this evidence should have been admitted are:

1. It showed that at least the defendant was under surveillance if not under actual arrest as part of court-martial proceedings.

2. It further supported the claim the whole of the alleged court-martial was simply to force a confession. [26]

ASSIGNMENT OF ERROR No. 18.

The Court erred in sustaining objection to introduction in evidence of defendant's exhibit K for identification: Pass for tools, as follows: (Bill of Exceptions, p. 45.)

"SASCMD5-5
8 October 1943.

"To Whom It May Concern:

1. Mr. T. E. Dudley is to be permitted to carry the following to and from his work at this Depot.

1 Set Drawing Instruments.
1 Machinery Hand Book.
1 Triangle.
1 12" ruler, 1 steel rule.

2. He is also permitted to carry partly finished drawings of tools to and from the field. This pass will terminate 1 December 1943.

For: R. G. JAMES,
Captain, Air Corps,
Engine Repair Officer."

Witness Dudley testified substantially that he was assistant to the supervisor of tools and methods: that they designed tools, rebuilt tools, made fixtures, built buildings, tore them down and moved ma-

chinery; that he had contact with the tool room and supply department; that tools were issued to him for use in his work. (Bill of Exceptions, p. 16.) He was not permitted to go further. (See Assignment of Error No. 19, next following.)

The reasons why this evidence should have been admitted are:

1. It was competent to show the system in use at the field under which employees were permitted to take tools from the Field.

2. It was relevant to the defense of defendant as showing tools could be off the Field and yet lawfully in possession of that individual. [27]

3. It was material to the defense of defendant as showing that persons other than defendant were permitted to take tools from the Field to the homes.

ASSIGNMENT OF ERROR No. 19.

The Court erred in sustaining objection to the testimony of witness Dudley regarding expendable tools, on the sole ground that defendant had already testified on the same point. (Bill of Exceptions, p. 46.)

The testimony of witness Dudley on this point was substantially that expendable tools were tools consisting of a great many items that supervisors or foremen or leaders can draw, which were put out on the line or to mechanics and not charged to anybody; that when they are worn out they are thrown away; that everybody, army officers, laboratories use them; that when they are used that

way no one is called upon to account for them or to return them. (Bill of Exceptions, p. 46.)

The reasons why such evidence should have been admitted are:

1. That it was competent in corroboration of defendant's testimony that small tools, such as defendant was charged with stealing and having unlawfully in his possession were, upon being issued to an employee, classed as expendable and marked off the records at the Field.

2. It was relevant to the defense as showing the impossibility of defendant ever being able to return these small tools to the Field, as there was no record of their existence once they were issued to the employee.

3. It was material as showing absence of reasonable doubt of the guilt of defendant as to any felonious intent of defendant in taking the tools in the first instance.

ASSIGNMENT OF ERROR No. 20.

The Court erred in refusing the offer of counsel for defendant to prove by witness Dudley that all the small drills, as one [28] item of the indictment, were all expendable. (Bill of Exceptions, p. 46.)

The reasons why such evidence should have been admitted are:

1. It was competent to show, as one link of the chain of defense of defendant, that all small drills which defendant was charged in the indictment as having stolen and as having unlawfully in his pos-

session, were of such character that defendant could not return them to the Field.

2. It was relevant to the defense of defendant, as showing no one had nor could identify any of them as coming from or as ever having been on the Field.

3. It was material to the defense of defendant for the above reasons.

ASSIGNMENT OF ERROR No. 21.

The Court erred in sustaining objection of counsel for plaintiff on the grounds of incompetency and irrelevancy to question asked witness Dudley as follows: (Bill of Exceptions, p. 46.)

"Q. Do you know of your own knowledge whether tools from the Field could be taken home by workmen by authority of the officers in charge of the Field and used at home?"

The reasons why such evidence should have been admitted are:

1. It was competent as showing tools in the possession of an employee off the Field were not prima facie evidence of theft or unlawful possession and, in fact, no evidence against defendant at all.

2. It was relevant to the defense for the same reason.

ASSIGNMENT OF ERROR No. 22.

The Court erred in sustaining objection of counsel for plaintiff on the grounds it was incompetent, immaterial and irrelevant and no bearing on the case to question asked witness Dudley as follows: (Bill of Exceptions p. 46.) [29]

"Q. Do you know whether the tool room at McClellan Field finally posted notices to the effect that tools borrowed for home use were to be returned?"

The reasons why such evidence should have been admitted are:

1. It was competent as showing that the taking of tools from the Field for home use by workmen was commonplace.

2. It was material to the defense as rebutting a charge of theft based upon possession of tools off the Field.

3. It was relevant to the issues of theft and unlawful possession as showing total absence of criminal intent of defendant to commit any crime.

ASSIGNMENT OF ERROR No. 23.

The Court erred in sustaining objection of counsel for plaintiff on grounds it was incompetent, irrelevant and immaterial and no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows: (Bill of Exceptions p. 47.)

"Q. Do you know whether tools and equipment on the Field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them?"

The reasons why such evidence should have been admitted are:

1. It was competent to establish that the command at the Field discarded tools and it was common practice for employees to salvage them and

take them home with the knowledge and consent of the Field command; that such proof would rebut the claim of criminal intent charged against defendant.

ASSIGNMENT OF ERROR No. 24.

The Court erred in sustaining objection of counsel for plaintiff on grounds it was incompetent, irrelevant and immaterial, no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows: (Bill of Exceptions, p. 47.)

"Q. Do you know of your own knowledge whether an employee prior to August, 1943, could obtain a pass from the authorities to [30] take any of that material or tools from the junk pile or fire pit and take it off the Field?"

The reasons why such evidence should have been admitted are:

1. It was competent to establish that the command at the Field, after tools were discarded and junked, issued passes to employees to take such tools from the Field to their homes and that such was the common practice.

2. It was material to the defense as showing that mere possession of tools off the Field could not be considered as evidence either of theft or unlawful possession.

ASSIGNMENT OF ERROR No. 25.

The Court erred in rejecting the offer of proof on behalf of defendant made to show that a foreman issuing tools to workmen would find himself

with two of the same kind for the reason one workman would turn in the bit of a drill, receive a new one, another would turn in the shank and receive one, and when the workmen were shifted and turned in their drills, the foreman would have two drills instead of the one he had been issued, with no provision whereby he could turn in the odd drill to the Field; and further, that upon change of type of tools or equipment at the Field results in all former tools being thrown on the junk pile, sold to dealers in Sacramento and elsewhere or ordered thrown into the fire pit and burned. (Bill of Exceptions, p. 48.)

The reasons why such offer of proof should have been allowed are:

1. It was competent to show that tools from the Field found in the possession of any person off the Field, are not evidence either of theft or of unlawful possession.

2. It was relevant and material to the defense as showing absense of any criminal intent when tools were found in possession of this defendant.

[31]

ASSIGNMENT OF ERROR No. 26.

The Court erred in finding defendant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts.

The error of the Court was briefly as follows:

1. The only evidence that could *possible* connect the defendant with any crime was the fact he had tools in his possession.

2. To omit all evidence of possession from the case would leave nothing whereon to base a charge of theft.

3. To convict of theft alone necessitates indulging in a presumption of guilt, a presumption of intent, a presumption against reasonable doubt, resulting in a conviction founded solely upon presumptions based upon presumptions.

ASSIGNMENT OF ERROR No. 27.

The Court erred in refusing defendant a new trial on the grounds set forth in the written motion filed.

Wherefore defendant, Clinton B. McElheny, prays that by reason of the foregoing errors, the judgment entered in the trial Court adjudging him guilty of theft as set forth in the first count of the indictment in this cause be reversed.

Dated: March 8, 1944.

CHAS. L. GILMORE,
Attorney for defendant and appellant.

[Endorsed]: Filed March 8, 1944. [32]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that heretofore the Grand Jury of the United States in and for the Northern District of California, Northern Division, did find and return to and before the above entitled Court on January 7, 1944, its indictment against the defendant, Clinton B. McElheny, which indictment was and is as follows, to-wit:

> [Printer's Note: Indictment is not reproduced here, as it is set out in full at pages 2 to 11 of this printed record.] [1*]

That thereafter and on the 12th day of January, 1944, the defendant, upon being arraigned in person, entered a plea of Not Guilty as to all Counts of said indictment and did in open [7] Court orally waive trial by jury.

Thereafter, on the 17th day of February, 1944, the above cause came on for trial before the Honorable Martin I Welsh, one of the Judges of said Court, sitting without a jury, Emmett J. Seawell, Assistant United States Attorney, appearing as counsel for the United States and Chas. L. Gilmore, appearing as counsel for the defendant.

Whereupon the United States offered and introduced the following evidence and exhibits of evidence, and the following evidence was received or rejected, and objections and motions were made and rulings of the Court were entered, all as follows, to-wit:

*Page numbering appearing at foot of page of original Bill of Exceptions.

ARTHUR CHANDLER,

called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

My occupation is Investigator for the Air Service Command, Headquarter at McClellan Field. Have been employed approximately one year and am now so employed.

I am acquainted with Clinton B. McElheny who is sitting there with his attorney, Mr. Gilmore.

I had a conversation with Mr. McElheny both at the Intelligence Office and at his residence during November or some time around and about that time in regard to Government property.

I first met Mr. McElheny at the Intelligence Office, November 23, 1943, at which meeting were present Captain Ark, Sergeant Hubbs, Andrew Cecchettini and myself. The defendant said he had taken and had home Government property that belonged to the United States Government and that he would be willing to take an investigator to his home for that purpose of making an investigation to determine what he had that belonged to the United States Government, what he had taken home, and turn over to this investigator at that time all property that was found to be property of the United States Government. After this conversation at approximately 10:00 o'clock P.M. in the evening of November 23, 1943, I [8] went to Mr. McElheny's house with him. He asked me in and we went direct to Mr. McElheny's son's bedroom which he stated contained a tool box of tools. We went

(Testimony of Arthur Chandler.)
into his son's bedroom and Mr. McElheny pointed out this box of tools sitting right on the floor. So he was very careful to identify his personal tools from Government Tools, to remove all Government tools from that box and said that he knew they were Government property and he turned them over to myself and I returned those tools to the Intelligence Officer at McClellan Field. I have seen the majority of those tools in that box which you have just shown me in the residence of Mr. McElheny and several other items were recovered from a barn to the rear of his house and several other items were recovered from a house trailer in the back of the house. Mr. McElheny took me to the barn saying he wanted to be sure there was or was not any Government property in the barn and if so found to turn it over to me to take to McClellan Field. I found some of these items. After we went into the barn we went into the house trailer as Mr. McElheny suggested we would look in the house trailer to see if there was additional Government property there. It was his house trailer and I found in these the extension cord and several pliers. Mr. McElheny admitted that he got them from McClellan Field.

Cross Examination by Counsel for Defendant.

The tools that are in that large envelope bear the United States Government marks and identification and the ones that are in the carton are not marked with the specifications of the United States Government. There is a way of identifying or es-

(Testimony of Arthur Chandler.)

tablishing the fact that those came from McClellan Field other than the statement of Mr. McElheny, as we have the stock tracer from the tool issue who is in charge of all tools and he can explain better than I can the identification of those particular tools.

(Bit or drill exhibited to witness.) That is a standard drill and those taps are standard. [9]

"Q. Isn't it a fact most any of these, such as reamers can be purchased anywhere"? Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial and outside the direct examination, which objection was sustained by the Court.

WARREN WILFORD PARK

called as a witness on behalf of plaintiff, having been duly sworn, testified as follows:

I am now and for the five years last past have been Supervisor in charge of tool issue at McClellan Field. I am familiar with tools that are issued of that field. The book you have in your hand is a stock list listing small hand tools, published by authority of the Commanding General, Army Air Forces, Headquarters Air Service Command, Patterson Field, Fairfield, Ohio. The witness was asked if it was a stock list issued by the Commanding General and counsel for defendant objected on the ground that it called for an opinion and conclusion of the witness.

(Testimony of Warren Wilford Park.)

The Court then examined the witness on his voir dire and the witness testified in response to questions of the Court as follows:

I have charge of the book. It came from the tool issue, McClellan Field, issued to me in connection with my duties. It came from the Supply Division for the purpose of establishing, keeping our records and getting the correct names of tools. We do not keep the records in this book. We just get the correct names of tools and prices and stock numbers. I am quite familiar with the book.

Whereupon the Court ruled as follows:

"You may use it in regard to the items which will be presented to you, if it is necessary. Use it to identify the articles that are presented to you, as to what they are and where they came from".

The witness proceeded in his direct examination. The marking on the 10 inch steel wrench just handed to me has the marking on it that is put on the wrenches at McClellan Field, "U. S. Army". That is the way tools bought under federal specifications are [10] marked at McClellan Field which question was objected to by counsel for defendant as calling for the opinion and conclusion of the witness. No ruling by the Court.

I know how this wrench was bought. They are bought by contract from Wright Field, wrenches similar to that. Wright Field is the main depot for buying government or army property. Not all tools are marked "U.S.A.". Tools of this type are. That particular wrench is.

(Wrench offered as Government Exhibit No. 2

(Testimony of Warren Wilford Park.)

which was objected to by counsel for defendant on the ground it had not been properly identified, which objection was overruled.) Admitted as Government's Exhibit No. 2.

The padlock just handed to me has a number on it similar to the ones put on at McClellan Field and this number is "155". They did use this to mark the padlocks at one time, a long time ago. They used that way to identify the padlocks at McClellan Field; not all of them, but not now. They don't use that any more. They used it on this type of padlock.

(Padlock offered as Government's Exhibit No. 3 and admitted over the objection by counsel for defendant that it was purely hearsay.)

The item you have in your hand now is a machinist's scriber, double point, nine inches long. It has the same marking as the wrench, "U. S. Army". I identify it by the marks "U.S.A." and that is the way these articles are marked at McClellan Field.

(Machinist's scriber admitted in evidence as Government's Exhibit No. 4, over the objection of counsel for defendant that the same was purely hearsay.)

I can identify the pair of pliers now shown me by the mark "U.S.". All of that type we have in stock are so marked.

(Pliers offered and received in evidence as Government's Exhibit No. 5 over objection of counsel for defendant that the same was hearsay.) [11]

(Testimony of Warren Wilford Park.)

The steel tape you have in your hand is marked "Air Corps, U. S. Army" and that is the way this type of tape is marked at McClellan Field.

(Steel tape offered and received in evidence as Government's Exhibit No. 6 over objection of counsel for defendant that it was hearsay.)

I identify the 8 inch steel wrench shown me by the marking, "U. S. A." which is put on all wrenches of that type at McClellan Field and by that identify this wrench as coming from McClellan Field.

(Wrench offered and received in evidence as Government's Exhibit No. 7 over the objection of counsel for defendant that the same was hearsay.)

The pliers you now show me I identify by the marking "U.S." on it, which letters indicate "United States" to me. We have similar pliers at McClellan Field marked that way.

(Pliers offered and received in evidence as Government's Exhibit No. 8 over objection of counsel for the defendant that the same was hearsay.)

It was then stipulated between counsel that a lot of tools in a paper bag might be exhibited to the wtiness at one time.

I saw all those tools in that paper bag this morning and I can identify each of them by the mark "U. S. A.", which indicates to me that they are United States Government property and we have similar tools so marked at McClellan Air Field.

(The lot of tools and paper sack were offered and admitted in evidence as government's Exhibit No.

(Testimony of Warren Wilford Park.)

9 over the objection of the counsel for defendant that the same was hearsay.)

I saw all those articles in that box including the electric cord and other articles this morning in your "United States Attorney's office. We have similar articles to those at McClellan Field. They are all listed in the stock list. That is, just the tools. I never saw these particular tools until this morning and [12] never saw them on the field. I checked against my stock list and found all the tools in this box are of a similar type we have at McClellan Field. I never saw anything like that pump out at McClellan Field. With that one exception, all the rest of them are similar to articles out at McClellan Field.

All the exhibits in the box were then offered as Government's Exhibit next in order, to which counsel for defendant objected on the ground it was hearsay, highly irrelevant and on the further ground it called for an opinion and conclusion of the witness and an endeavor to convict on approximation or similarity, to which objection the Court reserved its ruling.

Thereupon the witness further testified on cross examination as follows:

U. S. Exhibit No. 7 is just a standard 8 inch Crescent wrench and I believe similar to those that are used in other places besides the air field. The United States may have tools of similar character in other places than McClellan Field and might be marked "U. S. A." if they are a government organi-

(Testimony of Warren Wilford Park.)

zation. I never went to a second-hand store where they sell Government property and never saw any similar things purchased by private citizens. All I have testified to is that these wrenches are similar to ones on the Field and that is as far as my testimony goes. That holds true to all of the things in the same category including the tape which is a standard steel tape, the two pairs of pliers and the padlock.

MAX V. HUBBS

called as a witness for plaintiff, being duly sworn, testified as follows:

I am a Sergeant at McClellan Field, California, assigned to the Intelligence section of the Sacramento Air Forces, United States Army, and was so employed on November 24, 1943. I know Clinton B. McElheny and he is sitting there in the courtroom. I saw Mr. McElheny on or about November 24, 1943, in the office of [13] the Intelligence Officer at which were present Captain Ark, Mr. Cecchettini, Mr. Chandler and myself. I was present when the defendant gave a statement as to certain Government tools and Government property that he had at his home. I was asked by Captain Ark to write this statement in longhand while it was being given. I recognize the writing on this piece of paper as my handwriting and aside from the heading it was written as expressed by Mr. McElheny. After I had

(Testimony of Max V. Hubbs.)
written it, Mr. McElheny read it, signed it, "Clinton B. McElheny". He identified all pages with his signature.

The statement was then offered in evidence, at which point counsel for defendant asked the Court for the opportunity of reading it as he had never seen it before. Counsel requested the Court for permission to ask the witness a few questions, which was granted.

Cross Examination

Mr. McElheny returned from his home with Mr. Chandler with the property that is exhibited and at that time Captain Ark, who was then Lieutenant Ark, was present, I was present and I believe Mr. Chandler was still there and they discussed this property that was involved after the property was brought from Mr. McElheny's home to the Field. Mr. McElheny was before this group prior to going to his home and he returned with Mr. Chandler with the property to the same group of people. As preliminary to this statement there had been another hearing or interview between the group officers. He was notified to come into the office at his convenience but I do not know who invited him. He arrived after I was there. As to the statement, "I, Clinton B. McElheny having been duly warned of my rights under the 24th Article of War", that means from a military standpoint and affecting those people who come within the Articles of War, there is a provision wherein a person is advised of his rights. The 24th Article of [14] War pertains

(Testimony of Max V. Hubbs.)

to those rights as respects making a statement and the officer taking the statement as explained further in that paragraph, is a representative of the Court,—any military Court, inasmuch as he is a summary court officer especially appointed for that purpose.

The statement further says, "knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths" and Captain Ark is appointed as a summary court officer. He is an intelligence officer and an intelligence officer in some cases is appointed as a summary court officer and as such under the military rules he represents the military court in the taking of a statement.

Mr. McElheny at that time was advised of the foregoing fact at that time. He wasn't before a court or tribunal. He was before the Intelligence officer who was the representative of a military court for the purpose of taking the statement. Captain Ark is an intelligence officer and I am not prepared to explain the details as to when that authority begins or ends as to the full responsibility. He is a commissioned officer and I am a non-com.

The statement referred to was offered and received in evidence as U. S. Exhibit No. 10, over the objection of counsel for defendant that no proper foundation had been laid for its admission; that it constituted extrajudicial confession with no foundation made therefor and on the further ground it was pure hearsay. The statement is in words and figures as follows:

(Testimony of Max V. Hubbs.)

"24 November 1943, McClellan Field, California.

I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the [15] processes of a military court or tribunal duly authorized to take oaths, without any threats, coercion or promises of any immunity, do hereby swear and affirm that the statement I am about to make is a true statement.

"The only articles of government property I have or had in my possession off the reservation or had any knowledge of having were the articles that Mr. Arthur E. Chandler recovered from my home on November 23, 1943, with the exception of the following listed articles which I disposed of on the 21st of November 1943:

"A. Three Oxygen Pressure Gauges.

"B. One dozen old files.

C. One and one-half of two pounds of bolts and nuts.

"D. One electrical plug.

"E. About one-half dozen pieces of 2 inch or 3 inch copper tubing.

"F. About one-half dozen copper tubing ¼ inch fittings.

"G. Three pronged electrical plug.

"H. One set of steel stencils.

"The only other exceptions to those listed above are those articles which were given to me on a pass to be taken from McClellan Field for my own personal use, and they are described as follows:

(Testimony of Max V. Hubbs.)

"1. Several hundred boiler tubes.

"2. Approximately 2500 feet of lumber.

"3. Approximately 300 feet of 3 by 3 by 1/8 formed angle steel.

"4. One boiler base.

"5. Two five gallon cans.

"6. Two alcohol barrels.

"7. Several lengths of flexible conduit.

"There are three pages to this statement."

Signed: "Clinton B. McElheny. [16]

"Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A. C., Summary Court Officer."

Whereupon counsel for defendant moved to strike out all of the items in the statement not contained in the indictment, which motion was denied by the Court.

Cross Examination

I was present during the discussions and took the statement. The first discussion involved at considerable length a general problem on the basis of which Mr. McElheny was very conversant. The first interview continued for about two hours and the second one was from half hour to an hour. There was a great deal more said between the parties and said by Mr. McElheny than is contained in the statement. That is all that occurred as respects the property involved. There were other discussions that took place concerning problems at McClellan Field at the first meeting. Lieutenant Ark at the second meeting, asked quite a few questions of Mr. McElheny and so did others. I couldn't actually say

(Testimony of Max V. Hubbs.)

whether he made responses to them all. I was present but all those questions and answers are not in the statement.

Redirect Examination

All that was stated in regard to Government's Exhibits 2 to 9 inclusive in regard to these tools is contained in the statement.

Recross Examination

This statement contains references to articles which have been introduced in evidence as plaintiff's Exhibits 1 to 9; also to property that he disposed of and property that he took out on pass.

WALTER E. MOEHLE,

called as a witness for plaintiff, being duly sworn, testified as follows:

I am now and have been for approximately three years a Special Agent, Federal Bureau of Investigation. I am acquainted with Clinton B. McElheny who is sitting at the counsel table. I saw him first at McClellan Field on or about November 29, 1943, and had a [17] conversation with him in regard to the facts of the case as told to me by Captain Ark of the Intelligence Office at McClellan Field. Mr. McElheny was also on the Field at that time and I made an appointment with Mr. McElheny to come to my office here in the Post Office Building. He came to my office on the afternoon of November 29, 1943, at which time there was also present Special Agent Goeke. At that time I reduced to writing what Mr.

(Testimony of Walter E. Moehle.)

McElheny told me. The writing you have shown me is in my handwriting and is the statement that was signed by Mr. McElheny in my presence. He signed the first and the second page. The typewritten pages represent the list of articles that Mr. McElheny stated were recovered from his home and those articles so listed were Government property. He stated at that time the list was correct.

Examination on Voir Dire

On November 29, 1943, at the time this statement was taken, Mr. McElheny was not under arrest. I met him at the Field that day. I do not know when the typewritten list was prepared, but it was handed to me by someone else. I don't remember the exact date. I checked the articles attached here as List No. 1 and reviewed them thoroughly. They were not in my office at the time I interviewed Mr. McElheny. None of the articles in that list were in my possession in my office at the time I questioned Mr. McElheny.

Statement offered as U. S. Exhibit No. 11, to which counsel for defendant objected on the ground it was incompetent; that it was hearsay and that it was in the form of an extrajudicial statement for which no foundation had been laid, which objection was overruled and the document admitted, which reads as follows:

"Sacramento, California, November 29, 1943.

"I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special

agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; [18] and no threats or promises have been made to me. I know it may be used in court.

"I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division. On or about December 15, 1921, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

"50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

"Most of these items were in various boxes at Sacramento Air Depot and were materials charged out to me.

"I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating a federal law in so doing.

"I have read the above statement and say it is true."

Signed: "Clinton B. McElheny."

"Witnesses by: Walter E. Moehle, Special Agent, F. B. I., Sacramento, Calif., 11/29/43; Robert E. Goeke, Special Agent F. B. I., Sacramento, Calif., 11/29/43."

Whereupon counsel for the plaintiff offered in evidence a box of tools which had theretofore been marked U. S. Exhibit No. 1 for identification.

To this offer counsel for defendant objected on the ground that there had been no identification of the items in the box. There was no evidence to connect this defendant with either the taking of the tools, or the abstraction of the tools in any way, shape, form or manner; that the only thing that might possibly connect the defendant with them is the fact of similarity; that [19] there was no rule of law under which an individual could be convicted of the crime of theft or by possession simply because of the fact he has in his possession something that is similar to that which another person has; that the United States comes into Court as an individual, bound by the same rules of law and procedure as the lease of its citizens and with no greater rights or privileges; that if there should be a conviction upon similarity it must arise through a presumption of guilt by the Court and not a presumption of innocence; that the mere fact that one has in his possession a thing which is similar in all respects to some item which may be or may not be found in some government bureau, agency or operation is not of and in itself a sufficient showing to convict one of a crime.

Whereupon counsel for the plaintiff said, "I will concede that. There is no argument as to that."

Whereupon counsel for defendant further argued, without the rule of similarity, then the alleged confession itself could not be admitted in evidence; that

there has not been any identification of a single thing in that box and it is insufficient to show that things of a similar character have been abstracted.

To which counsel for the Government stated, "I have conceded that, Counsel. There is no use arguing that."

Counsel for defendant further argued that if the only point that the prosecution has to depend on is the mere matter of similarity, then in that event there was nothing before the Court sufficient to authorize or allow the introduction of anything that was in the box; that witnesses have testified that they are common, ordinarily accepted things, used by anyone and all that we have as a basis for their introduction is an extrajudicial confession taken from an individual who is under a summary court, maintained under the Articles of War, where he is put upon a trial of the case and thereupon certain statements were wrested from [20] him; that he was convicted by a summary court first, followed by an F. B. I. man who takes him in, yet he is not under restraint by any process of law. They had usurped the powers of this Court and upon that wresting from the individual of an extrajudicial confession seek upon that confession alone to bring in evidence they claim is sufficient to convict. To admit it in evidence is to convict him upon extrajudicial testimony in its entirety. If they can identify those things and connect this defendant with any testimony, or any evidence competent in any respect, there would be no objection, but counsel does object

to the violation of a rule of law that has been established and maintained for many years, that evidence of that character is not admissible when there is no other foundation laid except an extrajudicial statement.

The Court overruled the objection and the box of tools was admitted as U. S. Exhibit No. 12.

Whereupon the plaintiff rested and the defendant, to maintain his defense introduced and offered the following evidence.

CLINTON B. McELHENY,

defendant, called as a witness in his own behalf, having been first duly and regularly sworn, testified as follows:

My name is Clinton B. McElheny and I reside on Auburn Boulevard, Fair Oaks District and have resided there for five years. I have been a mechanic and supervisor of Air Craft Shops for approximately 16 years. I went to work as a mechanic and welder for the United States Army Air Corps in San Diego, March 1, 1929; came to McClellan Field in 1939 and have been continuously employed by the United States Army Air Corps. I was so employed from 1939 at McClellan Field until November 25, 1943.

The document you have handed me is headed, "Headquarters, Sacramento Air Service Command" dated November 30, 1943, and is the official suspension by order of Captain Mitchell. The other [21]

(Testimony of Clinton B. McElheny.)
one, dated December 8, 1943, is a notification of personnel action. States the date last worked as November 25, 1943, is correct. When I first went to work at McClellan Field, I was employed as a mechanic and welder supervisor. I had a similar position at San Diego. When we came up here from Rockwell Field, this Field was about 20 per cent complete and I was put in charge of several gangs of men putting the place in condition. I had charge of pipe fittings, some electrical work, some rigging, moving of heavy machinery and in general putting the buildings into condition for occupancy. The buildings were behind schedule and we had to do about three-quarters of it. I was acting foreman then. On April 6, 1942, I was appointed group superintendent, maintenance group, as a plant maintenance. On September 1, 1942, I was made general foreman of Air Craft Shops.

Whereupon, document dated April 6, 1942, Notice of Appointment of defendant, Clinton B. McElheny, from general foreman, general mechanic to group superintendent, maintenance group OA, plant maintenance, offered in evidence as defendant's Exhibit "A".

Also document dated September 1, 1942, change in status from general foreman of maintenance to general foreman of Air Craft Shops McClellan Field, as defendant's Exhibit "B".

Also employee's copy dated October 13, 1942, appointment of defendant from General Foreman, Air

(Testimony of Clinton B. McElheny.)
Craft Shops to Assistant Superintendent Air Craft Shops, as defendant's Exhibit "C".

All of which were objected to by counsel for plaintiff on the ground they had no bearing on the guilt or innocence of the defendant which objection was overruled and the Exhibits admitted in evidence.

In my position as foreman and as assistant general superintendent, it was necessary for me to have tools issued to me from the tool room supply department of the field. The memorandum receipt dated 9/27/39, Sacramento Air Depot Supply, Clinton McElheny, con- [22] sisting of three pages, was issued to me September 27, 1939, and is part of some of the tools which I brought with me from San Diego. There were a great many more than this and prior to my coming to the Depot here from the San Diego Depot, some of my tools were shipped to a Captain Austin. There was a welding machine, welding torches, hoses, welding regulators, and some heavy tools.

Whereupon counsel for the Government interrupted to make an objection that this testimony was foreign to the case and did not involve any article they had there and was incompetent, irrelevant and immaterial.

Whereupon the Court inquired, "What is the purpose?"

Counsel for the defendant stated that it was to show that these tools are issued to this man on

(Testimony of Clinton B. McElheny.)
this memorandum and charged to him and is stating the general nature of what was handed to him; that these tools are only a small part of what this man had and was leading up to the point as to how these tools were first issued to him and how and why they found them at his home; that counsel could proceed only in the ordinary way and if it is not germain it may be subject to a Motion to Strike; that the defendant had been a long time in the service from 1929 and as he has stated, he had to bring a great number of tools from San Diego to this Field in 1939.

Whereupon the Court inquired, "Those tools are not in issue here, are they?"

Whereupon, Counsel for defendant stated, there are some tools right here that are charged that the Court allowed to be introduced in evidence.

Counsel for the plaintiff stated he was not talking about the tools taken to the Field; that counsel was talking about the tools the defendant took to his home.

Whereupon, Counsel for the defendant stated that the defendant [23] is going from the Field to his home and from San Diego to his home too, with tools; that he intended to show by this witness that the witness has had in his possession hundreds of thousands of dollars worth of tools of which these are only a small part.

Whereupon, the Court stated, "We are only interested in the tools taken from the Field".

(Testimony of Clinton B. McElheny.)

Whereupon, Counsel for defendant said, I am leading into that now. I can show them on his memorandum as they are charged to him. Then I will show that a lot of this stuff has been paid for; that it has been deducted from his pay. We have the receipts. I am showing that this man is no thief. He has been too long in the service. Just as proud of his position——

Whereupon the Court interjected, "There is no need to argue now. Proceed".

Whereupon, Counsel for defendant stated he had given Counsel a large number of these particular memorandums and that some of these items you will find right here.

Whereupon Counsel for the plaintiff read off some of the items as follows, with the remarks:

One refers to Blue Ribbon bicycles. There are no bicycles here.

The next one refers to a paper fastening machine. There is nothing like that here.

The third one refers to a precision measurement book. There are no books here.

He has given me one referring to a level, machinery testing. There is no level in this case.

He has given me a lubricator, pressure type. There is no lubricator, pressure type here.

Fan, desk and wall.

"I assume this man was at the Field and had different tools charged to him. I am not talking about the tools he had charged [24] to him and

(Testimony of Clinton B. McElheny.)
issued in his work. I am talking about tools he took from the Field and took to his home which he stated he knew was wrong and against the law to do."

At which point the Court stated, "That is the issue."

Whereupon counsel for the defendant stated that he was endeavoring to show the system in vogue at the field; to show that everything that he got was on a memorandum; that the defendant was charged with these tools and that the individual working at the field had tools issued and charged to him and when he turned some in he gets a credit. Those he hasn't turned in ar deducted from his pay.

Whereupon the Court stated the issue was whether the defendant took these particular tools from McClellan Field and defendant's counsel then stated that he brought a lot of the tools in evidence from San Diego.

Whereupon, counsel for the Government stated he was withdrawing the article described in the indictment as 1 pump, Lehman Brothers, size 26, number 15229.

Whereupon, defendant identified one Warding eight inch flat file in evidence as being included in his memorandum dated June 2, 1942, number 4223192 on page 2 thereof and also one flat file, bastard No. 2 cut six inches; also one-half round bastard file, ten inch; also one-half round 8 inch;

(Testimony of Clinton B. McElheny.)
also one flat 10 inch; also one 8 inch; also one 12 inch; also one knife file.

Whereupon the Court inquired, at the suggestion of Counsel for plaintiff, as to the purpose of this examination. Defendant's counsel then stated that these tools were issued to him on the memorandum exhibited, which memorandum was canceled by the field, showing that defendant had bought the tools and paid for them and that if the Government had any action against the defendant, it was a civil suit. Further, that the showing was being made to show the absence of any felonious intent or any act of stealing, as these [25] tools were regularly issued to him by the tool section on these memorandums.

Examination on Voir Dire

By Mr. Seawell.

These tools I have identified are tools set forth on this memorandum. Other tools shown are expendable material. These I have identified I paid for in November. I have had hundreds of articles issued to me out there and can identify these particular items as I had them at home. I did not know I should not have had them at home. I was told by the officer at the Court Martial trial I had committed an offense by taking tools home which were charged to me. I thereafter told Mr. Moehle I shouldn't have them at home and violated a Federal law in so doing. I didn't know that a lot of these weren't charged to me other than that they were expendable items.

(Testimony of Clinton B. McElheny.)

Whereupon Counsel for plaintiff stated he could not see the materiality of this testimony; that the defendant took government property home and converted it to his own use, which is the essence of the charge; that it made no difference that some might have been charged to him and others were not.

Counsel for defendant argued that if the defendant was charged with the tools; he did not take them with felonious intent and that certain items were issued on memorandums and others were issued as expendable material.

The witness then further testified:

My position as general foreman was the last I occupied immediately prior to being transferred to Assistant Superintendent of Air Craft shops. At the time of my transfer I had tools in my possession from both the supply and from the tool rooms for use on the field and not at home. At the time I was made Superintendent, I had thousands of dollars worth of equipment charged to me, some of which I attempted to explain that I brought from San Diego. There are in this box some I brought from San Diego. The torch [26] I have on this 1939 memorandum. I would say there were a thousand articles I had taken over from the man in plant maintenance, who died, which I had turned in and converted to other people who had army jobs and some of that material I still have on my memorandum and some of it I paid for lately. From 1942 until I was removed from my job on the Field I had succeeded in turning in a great

(Testimony of Clinton B. McElheny.)

amount of material and some I had transferred to the men who were using them. I drew thousands of tools, both expendable and charged to me and let at that time other mechanics use them. All of the tools, for instance, in plant maintenance were charged to me. Lathes, electric drills, electric concrete breakers, air concrete breakers. And when I became shop superintendent I had this box of tools plus a great many more which I had no place to put or store and it was more or less for us to find some place to put them so I took these tools and had them put in a box and that is how they came to be in that box. They were in my office. I paid for a lot of material which you will see we have a receipt for which was stolen from my office. This material was given to me for my use on the field and it was stolen from my office, so at that time I decided I had better do something about it, because they came through once in a while and cleaned the place up and I lost a lot of tools like that and paid for them. They were lost on the field by being cleaned up. It was my responsibility and I paid for them if I couldn't prove they were stolen or thrown away in the cleanup. I have memorandum receipts of credits back in June, 1941 and 1942 where I have continually tried to turn this material in and worked with Mr. Parker of the tool room to clean up my memorandums. From the start of the war until I was released by the Government, my average day was around fourteen hours a day.

(Testimony of Clinton B. McElheny.)

The Court then asked, "Well. We are interested in finding out why you took the tools to your house and kept them for such a long time. That is the issue". [27]

Whereupon the witness further testified:

As I say, there was some expendable material. That is, the foreman drew this material which was not charged to anybody and he distributed it out to other employees. So I gathered up this material and had it put in a box and this is the material I had at my home. At the time I put it in the box, I had no place to preserve it, understand. I took them home. There was more than this. They were expendable material which I had not distributed out to the men. I took them home in 1942 and after 1942 and until the F. B. I. came and took them away. I would say they were there a year and a half. In the meantime I had brought back quite a bit of this material. I had them stored in the house not knowing at the time when I would be able to clear up my memorandum. Some of them were actually charged to me. I had been sorting them out and had been making an honest effort from the time I was shop superintendent to clean this material up. I worked fourteen hours a day. Sometimes three shifts a day. I had to stay three shifts and had very little time to go over these tools. Some of these tools I paid for that were lost that are on my memorandum I didn't take home. However this stuff was at home. I have a tape that I carried in my pocket. I see that there. That

(Testimony of Clinton B. McElheny.)
was home two or three days or a week when they came to my place. I carried that tape all the time. Whenever I had a job to do that required the use of the tape I would take the tape home or it would be in my pocket. If I went out on a wreck to estimate the damage to the road or the field and I carried that tape. When I went to Placerville and estimated the damage done to the road there I carried that tape. Other stuff charged to me, wrenches, tools off the place. Have done so repeatedly and didn't think I was committing a crime. I have carried some four or five hundred dollars worth of diamonds. Industrial diamonds in my pocket. I had no place to keep them. I have the receipts there where I signed for them. I [28] brought them from the depot supply and issued them to Engine overhauling Section which they in turn gave me a receipt. But prior to the time I issued them I carried them in my pocket. I have one receipt for three hundred and some dollars of industrial diamonds I carried off the base.

At the time I was made Assistant Superintendent, Air Craft Shops, October 13, 1942, I was then placed in the engineering department under the Supervision of the General Superintendent of Air Craft Shops and supervised the work of eighteen general foremen, Air Craft Shops, thirty-seven Assistant General Foremen, Air Craft Shops and approximately fifty-five hundred Air Craft Shops employees. I had not had time to complete the entire turning in of all of these tools and equipment here

(Testimony of Clinton B. McElheny.)
in evidence before I was suspended from my position.

Some of the tools here in evidence were issued to me but not on my memorandum receipt. In order to get this type of tool under the "17 B class", we fill out a form 81, for the amount we need to supply the men working for us, or as near as we could come to it and they were brought to us from supply and we doled them out as we saw fit to the persons that needed them that used them. Lots of times we drew too much and lots of times we drew too little. Those were not charged to me.

Whereupon defendant's Counsel asked, "Now, when you were attempting to leave or were transferred from one position to another, what means were provided to get them out of your possession?"

To which Counsel for plaintiff objected as incompetent, irrelevant and immaterial, which objection the Court sustained.

There are a lot of tools in this box that were drawn on Form 81. The drills, the files, the smaller reamers, the smaller drills and if you took them to the store room now——

On motion of Counsel for plaintiff the Court struck out the phrase, "If you took them to the store room now". [29]

Sometimes we took some of these tools to the store room or tool room and attempted to get them back into the possession of the Field, which statement was by the Court stricken out on motion of counsel for plaintiff.

(Testimony of Clinton B. McElheny.)

I did take some of them back to the store room and sometimes they would accept some and others they wouldn't, depending on the store keeper. Some of these small items are expendable. Such as those on Form 81 on which you draw files, small drills, wire brushes, small reamers; that is drills up to quarter inch; over that they are accountable and are on your memorandum. You draw on this Form 81 and expend them yourselves as foreman. That is how come I have so many of them of various sizes. I drew these tools. Maybe some of them three or four years ago and they have been in my possession at the field and at home as I said. I have drawn on Form 81 as many as thirty-five or thirty-six or three or four dozen sets of small drills up to quarter inch; India sharpening stones and such equipment which is doled out to the various men I had working for me. When I was foreman of the fuselage department it was common for me to draw at least two dozen of India sharpening stones and those stones were doled out. And files the same; small drills. In this box of tools there are undoubtedly some of those that have been left over, the residue—in the fuselage department, for instance. I had some 150 men. I would not be surprised that at times I had drawn 150 of one of those types of files and doled them out. I know for a fact I have drawn fifty of one type of file we have there and doled them out. And in the course of drawing these tools over say four years or five this is a collection of them in which some of it in

(Testimony of Clinton B. McElheny.)

the last few months or the last year they began to issue tool kits on a standard memorandum receipt, and some of these were included—some of which were included on the memorandum receipt. When I got the last memorandum receipt I believe I had—I don't know whether I [30] have it with me or not—I have a complete list of expendable material charged on my memorandum receipt. It is a new system set up to charge each man with the expendable items. Expendable and nonrecoverable is a phrase used in the Army and are those and consist of those small things stated. I have drawn thousands of dollars worth of expendable and nonrecoverable material and with no intention of theft I took them home. I was cleaning up my memorandum receipts and that is why they remained home for more than a year. I have credits way back in 1942, where I gradually cleaned them up. Every opportunity I had I cleaned up my memorandum receipts. I had some fifteen or twenty of them. After I was removed from my job I had tools turned in to the store room. There are some now on my memorandum receipts that I myself don't know where they are.

The Court observed, referring to the indiement, that there was a whole page of drills, and the witness continued his testimony.

Yes. Quite a few of miscellaneous drills of the old carbon type. At the suggestion of the Court that there were eighty-seven drills, the witness further testified, they were all small drills. Some of

(Testimony of Clinton B. McElheny.)

them I had only a short time and some I had a whole year at home. As I cleaned up my desk, I will say in August, 1943, I found some more material that was actually my responsibility, had no place to put it, I found it in my desk in plant maintenance. I had Mr. Lane put them in a box and bring them to my office. I in turn took them home and stored them. I did not take it with any intention of stealing. I tried to explain to the Court a while ago that I had been working hard, long hours and succeeded finally in cutting down my memorandum to a very few items and some of that is expendable material. I have credit memorandums to show I have been actually cleaning up my memorandums. Some of the expendable material I had at home I brought back. I had three [31] flashlights during the blackout that were issued, nonrecoverable. We have had some thirteen hundred of them and I returned mine to the post the 1st of November when I started cleaning up my stuff. I was just getting to this material. I have always cooperated with our socalled intelligence department while I was superintendent of the shops. I have not succeeded in cleaning up all my memorandums involving the particular tools in evidence. There are other and additional matters I have cleared up. Some of this material here is what is called expendable and nonrecoverable. They are the small drills, files, Indian stones and such. When they are used up they are junked. That particular drill pointed out to me is one of the type that is expendable and non-

(Testimony of Clinton B. McElheny.)

recoverable. The 5 x B Reamer is not. It is on my memorandum and I am required to account for it.

That oxygen gauge is one of several I bought at a junk yard. I had no bill of sale. I turned it over to Mr. Chandler as he suspected it was Government property along with some of my dies and collets which he also took with him. I bought that and some half dozen more of them from Solomon's Junk Yard on Atlantic Boulevard and brought them to Sacramento with me. They were of a type formerly used at the Field but now obsolete and have been since about 1937. All the quarter-28 are my personal die collets (Witness picks out of the collection 7 dies and collets). There is no way of determining from an inspection of those small drills which were issued to me from the Field or given to me or handed out to me as expendable and non-recoverable. There is no way to pick out from those drills those which are mine. Some I have had from sixteen to eighteen years and some from my previous employment in the boat shop, up to 5/16 and 1/2 inch. I cannot identify the difference between them.

Defendent's counsel then offered to examine the witness on a partially mimeographed and partially typewritten letter of the [32] Sacramento Air Service Command, McClellan Field, dated January 4, 1944, which defendant testified he received through the mail and offered to show that it was

(Testimony of Clinton B. McElheny.)
a demand from McClellan Field in the sum of $61.24 to cover the cost of lost tools.

Counsel for the Government objected on the ground it was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Defendant's Counsel offered in evidence Memorandum receipt issued by the War Department Air Corps, Sacramento Air Depot, Depot Supply, to Clinton McElheny, consisting of three pages dated September 27, 1939, containing tools identified by witness as being in evidence here for the purpose of showing that the tools and equipment were regularly issued to him; that he was charged for them and that they came lawfully into his possession.

Whereupon Counsel for plaintiff objected on the grounds they were incompetent, irrelevant and immaterial, not bearing on the guilt or innocence of the defendant and that no foundation had been laid, which objection was sustained by the Court.

Whereupon Counsel for defendant offered in evidence, Memorandum receipt in the same form to Clinton B. McElheny, No. 42-293, dated January 7, 1942, issued by Sacramento Air Depot, for the same purpose and on the same basis, which was objected to by counsel for the plaintiff on the ground that no proper foundation had been laid and was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant then offered in evidence Memorandum receipt in the same form, issued to

(Testimony of Clinton B. McElheny.)

Clinton B. McElheny, No. 42-3529, dated August 20, 1942, consisting of one page, for the same purpose and upon the same basis, to which counsel for plaintiff objected on the grounds no proper foundation had been laid; that it was incompetent and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained *by* [33]

Counsel for defendant then offered in evidence Memorandum receipt issued to Clinton B. McElheny No. 42-32912, account No. 561, dated June 2, 1942, consisting of four pages, to which Counsel for the Government proposed the same objection and which was sustained by the Court.

Counsel for defendant then offered in evidence Memorandum Receipt No. 42-9620 dated November 12, 1942, Account No. 561, to Clinton B. McElheny *was* was objected to by counsel for plaintiff on the same grounds and which objection was sustained by the Court.

Counsel for defendant then offered in evidence, Memorandum receipt No. 42-32352 dated June 5, 1942, from McClellan Field to Clinton B. McElheny, which was objected to by Counsel for plaintiff on the same grounds, which objection was sustained by the court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-18347, dated May 7, 1943, Account No. 561, from McClellan Field to Clinton B. McElheny, to which counsel for plaintiff objected

(Testimony of Clinton B. McElheny.)
on the same grounds and which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-9620, dated November 12, 1942, Account No. 561, issued by McClellan Field to Clinton B. McElheny consisting of one sheet, which was objected to by Counsel for plaintiff on the ground no foundation was laid and was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 44-15, November 23, 1943, from McClellan Field, to Clinton B. McElheny, which was objected to on the ground, no proper foundation, no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Counsel for defendant offered in evidence, Memorandum receipt No. 44-3909, Account E-M-7753, dated November 29, 1943, McClellan Field to Clinton B. McElheny, which was objected to on the same [34] grounds.

Counsel for defendant then offered in evidence, Memorandum receipt No. 44-68, Account No. E-M-3753 (5a), dated July 1, 1943, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground, no proper foundation was laid, no bearing on the guilt or innocence of the defendant, incompetent, irrelevant and immaterial, which objection was sustained by the Court.

(Testimony of Clinton B. McElheny.)

Counsel for defendant offered in evidence Memorandum receipt No. 43-6431, dated September 26, 1943, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground no proper foundation was laid, was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

Counsel for defendant offered in evidence Memorandum receipt No. 43-6564, dated September 26, 1942, McClellan Field to Clinton B. McElheny, which was objected to by counsel for plaintiff on the ground no proper foundation laid, no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Counsel for defendant offered in evidence duplicate receipt No. E N-3753, Voucher 1-12-44, issued to defendant for list of tools in the sum of $52.92, which was objected to by counsel for plaintiff on the ground it was incompetent, irrelevant and immaterial and outside the evidence in the case, which objection was sustained by the Court.

The testimony of defendant in support of the offer was as follows:

I received that receipt from the tool section of McClellan Field when I paid for my lost tools. Before I could get my final check I had to pay for my tools. I do not remember when that was. It would be either December, 1943 or January, 1944.

Whereupon the witness further testified: [35]

I did not at any time take any of the tools intro-

(Testimony of Clinton B. McElheny.)

duced in evidence here and claimed by the United States or McClellan Field with the idea or the intent of converting them to my own use.

I did not at any time ever claim to be the owner of any of them other than those which I had paid for under my memorandum, to which counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial, which objection was sustained by the Court.

I did not ever claim ownership of any of the tools here at any time up to the present date other than those collets which I picked out as my own private property. I had told these investigators prior to November 23, 1943, that I had taken tools home. I would say it was in the latter part of August or the first part of October, 1943. They had apprehended some person who had taken some material and called me up as Shop Superintendent to see if I would complain against the man or issue some complaint. They asked me what I was going to do.

I told them the only thing I could *so* as Shop Superintendent was to discharge the man, which I would do on their evidence, to which counsel for plaintiff objected and asked that the answer be stricken as having nothing to do with this case whatsoever, which objection was sustained by the Court.

Whereupon defendant continued:

I told them at that time I had tools I had taken home. Present at that time were Mr. Cecchettini, Captain Ark, Mr. Chandler a part of the time and

(Testimony of Clinton B. McElheny.)

Captain Kenny. I told them I had some of my tools at home and told them the circumstances surrounding the reasons why I had taken them home and that I was endeavoring to bring them back and turn them in, which I testified yesterday that I did and have been doing. At that time they did not do anything about it. However, they asked me as I said, to complain against these individuals which I could not do and if it would not be a [36] good idea to make an example of people who had taken material. I told them I didn't know. I wasn't well enough versed in that thing. However, I was doing my best to clean up my memorandums and would continue to do so. I was before the group mentioned in Plaintiff's Exhibit 10, the day before that statement was signed by me. They called me at night, I had worked until about 7 o'clock and asked me if I would come up to see them. I did that and Mr. Chandler then went with me to my place to see what tools I had. They said I should go to my place and return these tools with Mr. Chandler, which I had at home. They kept me there more or less questioning me after that—we got back about 11 o'clock I believe, or 12—until about 2 o'clock in the morning. They said they didn't believe me that this was the extent of the tools I had. That they expected to find a great many more machinery, heavy equipment and indications that I had gotten rid of a lot of machinery and tools. However, I did my best to assure them that I hadn't. They would come in and

(Testimony of Clinton B. McElheny.)

talk to me and they would go out. It was a sort of hodge-podge system of interviewing. One would talk to me and go away and leave me and give me no indication to go home. So I got home that morning about, I would say 2:30 or 3:00 o'clock and I appeared that morning at my work at 7:00 o'clock, the regular starting time. At about a quarter to eight, while at work in my office on test block equipment with the United States Engineer, Mark Falk and his assistants, this man Chandler appeared at my office and I asked him to wait until I had completed this job. I left my office at about 11:00 o'clock with Mr. Chandler and again went out to my place to see if we had missed anything, which he thought was Government equipment in the dark. We had gone there the night before. We found some other equipment that was scattered around. My tools had been moved. The roof blew off the shed or barn referred to and I had my boy move some of that stuff—some of that stuff that was left there [37] in the barn. Then we again returned to the Field some time after 12:00 o'clock. I went to lunch with Mr. Chandler and we came back to the Intelligence Office where this statement was written. Lieutenant Ark again accused me of having various equipment. Said I wasn't telling the truth. I didn't seem to be able to help him because I was telling the truth as I knew it. That went on again for a matter of two or three hours. Then they left me alone for some time. Then they called in a Captain Robert Pierce, who represented himself to be the

(Testimony of Clinton B. McElheny.)

Summary Court Martial Officer, representing the Commanding Officer, who said he wanted to take testimony or something of that sort and read me the Articles of War. I believe it was 80. He was a very nervous person and I didn't get a whole lot out of what he was driving at. He was terribly nervous. Appeared agitated. That would be the 24th day of November. It was the day after I signed Plaintiff's Exhibit 10 and that would make this meeting November 25th. Captain Pierce questioned me as to whether I had a bank account, whether I had taken any equipment, whether I knew certain people, whether I knew their business methods, whether I knew that the Government should not buy from a vendor but from a contractor and said that I bought materials from vendors. I said I did not buy material; that I recommended the purchase of material. I can be specific in this case if you wish.

I denied that I had purchased equipment from vendors because my own responsibility was a recommendation of equipment to be purchased, to which counsel for plaintiff objected as incompetent, irrelevant and immaterial and no bearing on the guilt or innocence of defendant, which objection was sustained by the Court.

Defendant further testified:

Preliminary to taking of any statement by Lieutenant Ark on November 24, 1943, he told me they had evidence that I had taken a lot of equipment from the Field and that they intended to prove [38] it and that I had not been cooperative with them and

(Testimony of Clinton B. McElheny.)

read me the Articles from a book. I am not an attorney. I am a mechanic. I was never arrested or prosecuted for any felony at any time in my life. I was arrested on traffic charges and I think I have one ticket for violation of a Motor Boat Act, fire extinguisher violation. Neither Lieutenant Ark nor anyone else advised me at any period of that proceeding or hearing that I was entitled to counsel and did not mention the fact I should have a lawyer and did not mention the word "lawyer."

I was taken to this meeting by Mr. Chandler. I was in his custody all the time. He practically lived with me during that time.

Which words, "he was in his custody" were objected to by Counsel for plaintiff as calling for a conclusion of law, which words the Court struck out on motion of counsel for plaintiff.

Defendant further testified:

I was with Mr. Chandler all of the time and he never left me far out of his sight. He went to my home with me and came back from my home with me. He went up to the hearing on November 24th with me and went with me before Captain Pierce on the following day, November 25th, and was in the room.

Cross Examination

I recall the 21st day of November, 1943, and do not remember disposing of some United States Government property on that day. I threw some junk down a well. I admitted it to the investigators and listed it for Mr. Moehle. That was not United

(Testimony of Clinton B. McElheny.)

States Government property. I wouldn't say that it came from the Air Field. Some might have come at some time, but I wouldn't be able to identify it as Government's material. I said some of it did come from McClellan Field. I threw some junk down a dug well. I was cleaning up my tools. I was told to clean them up prior to this and was cleaning out my back porch. There were two paint cans, [39] pieces of stove pipe, some old shoes, some old files, some pieces of copper tubing, some bottles, some old pieces of oxygen gauges, parts of oxygen gauges that you saw here yesterday and more or less junk material. It is my practice when I clean up around, that I take that junk down there and throw it down the well. I have been putting stuff in that well since I had the property. Material I had there wasn't returnable. If it was returnable I would have had to pay for it. I couldn't say for sure whether any of it was taken from the Field. There might have been some that came from the Field like the small files, or it may not have been government property. The oxygen gauges I had had for 10 years. Worn parts of oxygen gauges. I made no secret to anybody that I had disposed of that material, as set forth. They didn't find it in the well. I did not say that was United States Government property in the well and did not say it came from McClellan Field. I told Mr. Moehle it may have, some of it. The copper tubing may have. I had some of this government property at my home for a year or longer than a year, a year and a half. I said

(Testimony of Clinton B. McElheny.)

I was cleaning up my memorandums and returned a lot of material over a period of years. I had also cleaned up a lot of some other tools as shown by my credits. I had so much material I was returning that it took me a year and a half to return it and still have this much left. I didn't have a warehouse full at home but I had a warehouse full at the Field. These articles were at my home. This is the last material or practically the last material charged to me that I had access to. From time to time when I got time I got hold of Mr. Parker of the tool room or Mr. Tormeu of the Plant Maintenance who handled some of my Memorandum receipts for me and had them clean up tools for me. I gathered tools up and turned them in at the Field. I have to go through the records and sort them out and see what is expendable; otherwise I would have to pay for them if they are not cleared up. In over a year and a half [40] I didn't have time to return these tools and that statement is partially right. I drove out to the Field every day and sometimes three times a day. I did not have room at McClellan Field to store these tools and so took them home. I had charge of the whole maintenance division covering some 15 or 20 acres. There wasn't room there to store these few tools where they would be safe.

Whereupon Counsel for the plaintiff asked the witness:

"In other words, all the rest of the tools, the bomb sights and whatnot at McClellan Field are not safe,

(Testimony of Clinton B. McElheny.)

so to keep these tools safe you had to take them from McClellan Field to your home and put them in a trailer house and a garage and a barn. Is that your testimony?"

The Witness:

"May I refuse to answer that question?"

The Court:

"Answer the question."

The Witness:

"I can't, sir, because he put the question about bomb sights would not be safe. I cannot answer that."

Whereupon counsel for plaintiff asked the witness:

"With all the tools and the other equipment out at McClellan Field, some millions of dollars worth of equipment, you got so worried about these particular tools that you decided to take them from McClellan Field to your home so they would be safe, is that your testimony?

To which counsel for defendant objected on the ground it was improper cross examination, assuming facts not in evidence, as defendant had said nothing about being worried about tools, which objection was overruled by the Court.

Defendant further testified:

I took them home because I had no place to keep them except [41] in my office. I lost stuff at my office and had to pay for it. I bought them home for two reasons: So I could segregate them

(Testimony of Clinton B. McElheny.)
and return them and clear my memorandums, which I was doing, and where they would be under my own protection. I was Superintendent of the Maintenance Department and had 15 acres and many buildings thereon under my partial control and there were guards around the premises. I did not testify that I returned some of these tools; that I returned some of these tools and then brought them back to my home again. I said my memorandums were gowed up so that I didn't know what was charged to me. I could not say whether I did or did not try to turn in that particular wrench to the tool room. I did return some as evidenced by my credits. I believe I did try to turn in some of the articles that are in evidence here. I can't recall the particular ones. I can't say that truthfully because I did not take them back to the plant to return them until I found where they were charged to me so I could get credit for them. Otherwise I would have to pay for them.

I understand that expendable doesn't mean I can put a drill in my pocket or take it home and sell it. An expendable item is one you are not accountable for unless it is on your Memorandum receipt.

They don't issue material as expendable to take personally to your own home or to sell to somebody in the street. It is still property of the United States Government to be used only in the work. I called the attention of Mr. Moehle, the F. B. I. Agent, to a mistake in his list of tools and the type

(Testimony of Clinton B. McElheny.)

of torch that I am charged with; that my Memorandum was wrong. At that time I did not know and had not given any thought as to what was in the box and what we did pick up. I told Mr. Chandler at the time we picked up those tools I had no bill of sale for them but maybe some of them were mine. I may have mentioned that to Mr. Moehle the F.B.I. Agent: I am not sure. I had quite a lengthy conversa- [42] tion with him. I signed the statement you have exhibited to me on both pages. I read it. At the time that statement was taken I learned I shouldn't have had the tools in my possession and I was violating a federal law because I was told by Captain Ark that I had violated the law and I was told again by Mr. Moehle.

The other men at the Field were provided with places to lock their tools up. I had no place to keep my tools but in my office. I could not have a place to lock up my tools. I had some tools as late as November the 23rd and 24th in 1943 that were in the stock room in Plant Maintenance which were on my Memorandum receipts, being issued out to men that I was directly responsible for and would have had to pay for had they been lost. They were in the plant maintenance stock room, being issued to them. The four items you are showing me were part of the tools that I had been returning and which I admitted I took from the Field and took them home. I can't identify them as United States Government property. You will find "U. S. A." on all kinds of tools. I wouldn't say whether they were

(Testimony of Clinton B. McElheny.)

Government tools or not. If they came from my home and they had "U. S." on them I would not say they were Government tools. I wouldn't identify those wrenches that have "U. S. A." engraved on them as Government tools. Although I told the government agents they were government tools and I took them to my home. Although I took them from McClellan Field I still say I don't know whether they are Government tools.

Redirect Examination

Defendant testified on Redirect Examination as follows:

I have had Plaintiff's Exhibit No. 6, a steel tape, 50 feet, stamped "Air Corps, U. S. Army" in my possession for about a year. I drew it on an OMAR Ticket. I use that almost daily in my work. I carried it to and from the Field on my person and did not at any time claim to be the owner of it. I used the tape pretty near every day when I had occasion to do any measuring or estimating. [43] I recollect along about the 18th or 19th of November, Mr. Burroughs and myself and the United States Engineer used this tape to measure the test block area where we intended to put the test blocks. I carried it in my pocket instead of turning it back at the end of every day's work and getting it reissued to me the following day, I just continued to use it. It was in my possession at the time Mr. Chandler and the other gentlemen asked me about the tools and at that time I admitted having it in my possession.

(Testimony of Clinton B. McElheny.)

Recross Examination

I had the tape in my overcoat pocket at home the day the Agents went out there.

THOMAS E. DUDLEY

called as a witness for defendant, being duly sworn, testified as follows:

I reside at 2920-Q Street, Sacramento, California, and was employed at McClellan Field until October 23rd. I was assistant to the supervisor of tools and methods. They had what they call similar to a tool and method department, using the minds of all the men at the depot on ideas and ways on now to do things faster and better. My work carried me all over the depot. We designed tools, rebuilt tools, made fixtures, built buildings, tore them down and moved machinery. At that time I had contact with the issuance of tools from the tool room and from the department they call Supply. Tools were issued to me for use in my work.

Q. Were you ever given any permit or anything of that kind to take tools from the Field?

A. Yes.

To which Counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial, which objection was by the Court sustained and then moved that the answer be stricken, which motion was granted by the Court.

(Testimony of Thomas E. Dudley.)

I recognize the document handed me and I have had many of those issued to me. I am the T. E. Dudley named in the paper. [44]

Whereupon counsel for defendant offered in evidence Permit dated July 14, 1943, issued to T. E. Dudley by D. H. Searle, Captain, Air Corps, Engine Repair Officer, Headquarters Sacramento Air Service Command, McClellan Field, California, which was objected to by Counsel for plaintiff on the ground it was incompetent, irrelevant and immaterial.

Whereupon Counsel for defendant stated he was trying to prove the system in vogue at the Field under which tools came lawfully into the possession of Mr McElheny, to show the system that is used at the Field.

The objection of Counsel for plaintiff was thereupon sustained by the Court.

Counsel for defendant then offered the document for identification to be marked Defendant's Exhibit "K", which was as follows:

"Defdt's "K" for Identification.

SASCMD5—5

8 October 1943.

To Whom It May Concern:

i. Mr. T. E. Dudley is to be permitted to carry the following to and from his work at this Depot.

1 Set Drawing Instruments.
1 Machinery Hand Book.
1 Triangle.
1 12″ ruler, 1 steel.

(Testimony of Thomas E. Dudley.)

2. He is also permitted to carry partly finished drawings of tools to and from the field. This pass will terminate 1 December 1943.

For: R. G. JAMES,
Captain, Air Corps,
Engine Repair Officer."

Witness further testified that expendable tools are tools that are put on a memorandum receipt. For instance, if we [45] are short of tools or anything is needed, there are a great many items out there that the superintendents, or foreman or leaders can draw and then they are put out on the line or to the mechanics or whatever places they are in and they are not charged to anybody. When they are worn out they are thrown away. Expendable tools covers every phase. Everybody uses them. Army officers use expendable tools. Laboratories use them. Everybody. There are certain classes of expendable tools that cover, I would say, every operation in the whole depot. When they are used that way thereafter there is no one called upon to account for them or to return them.

To which counsel for plaintiff objected on the ground that defendant had testified what expendable is. Which objection was sustained by the Court.

Counsel for defendant then explained to the Court that the defendant had testified that anything over a quarter inch drill on down, comprising 50 or 60 of them in evidence were expendable and as the

(Testimony of Thomas E. Dudley.)
present witness testified they are thrown away so that they are no longer property and the defendant would like to prove that fact by this witness who was a designer of tools and equipment on the Field, which offer the Court denied.

Whereupon, counsel for defendant asked the witness if he knew of his own knowledge whether tools from the Field could be taken home by workmen by authority of the officers in charge of the Field and used at home. To which Counsel for plaintiff objected on the ground it was incompetent, irrelevant, no bearing on the guilt or innocence of the defendant, which objection was by the Court sustained.

Whereupon counsel for defendant asked the witness if he knew whether the tool room at McClellan Field finally posted notices to the effect that tools borrowed for home use were to be returned, to which counsel for plaintiff objected on the ground it was [46] incompetent, irrelevant and immaterial and had no bearing on the case, which objection was by the Court sustained.

Counsel for defendant then asked the witness if he knew whether tools removed from place to place on the field, that is tools charged out to employees, were moved and transferred without the knowledge and consent of the employee. To which the witness answered, "Yes".

Whereupon counsel for plaintiff moved that the answer be stricken and he objected on the ground

(Testimony of Thomas E. Dudley.)
it was incompetent, irrelevant and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Whereupon Counsel for defendant asked the witness if he knew whether tools and equipment on the field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them, to which counsel for plaintiff objected on the ground it was incompetent, irrelevant and immaterial and had no bearing on the guilt or innocence of the defendant, which objection was sustained by the Court.

Whereupon Counsel for defendant asked the witness if he knew of his own knowledge whether any employee prior to August, 1943, could obtain a pass from the authorities to take any of that material or tools from the junk pile or fire pit, and take it off the field, which was objected to by counsel for plaintiff as incompetent, irrelevant and immaterial, had no bearing on the guilt or innocence or the defendant and that all such questions were obviously out of order, which objection was by the Court sustained.

Whereupon Counsel for defendant stated he wished to prove by this witness, the system that the defendant had to operate under and to explain why these tools came into his possession as corroborative of defendant's testimony that as a matter of fact he had to take the things off the field

(Testimony of Thomas E. Dudley.)
because he could not clear up [47] his memorandums and get them back into the field.

Whereupon the Court stated, "The Court has ruled".

Whereupon Counsel for defendant made the following statements and the Court made the following ruling:

"May I be permitted to prove by this witness that this—particularly these drills and the reamers and so forth—that smaller tools are issued and charged to a foreman; if they are broken by a workman that the workman—one workman can turn in the bit and another turn in the shank and they get two drills. The foreman is charged with one drill. Well, when he tries to clean up and get his equipment cleaned up he can't turn back but one, and he has normally on his hands—and he has to go through an immense amount of red tape to get the tools out of his possession, and that in case of being shifted from one position to another that he could not do other than what he did, pick them up and take them home until such time as he could unravel his memorandum receipts and get them back into the posesssion of the Government. The system itself, that is what I am going to have this witness testify to, and he is the best man to do it because he is not only in and around the tool room but he is all over the field, he has designed tools, sees that they are made, and so forth.

The Court: The Court has ruled.

(Testimony of Thomas E. Dudley.)

Mr. Gilmore: May I be permitted to prove by this witness that when there is a change of any type of tools or equipment at the field then the former tools and equipment are condemned by those in command and they are ordered thrown on the junk pile, sold to dealers in Sacramento and elsewhere or ordered burned up and thrown in the fire pit.

The Court: The Court has ruled already, Mr. Gilmore."

Rebuttal

ARTHUR CHANDLER,

witness for plaintiff, recalled in rebuttal, [48] testified as follows:

I had a conversation with the defendant in regard to what he threw down the well, at the Intelligence Office at McClellan Field at which were present Andrew Cecchettini, Captain Ark and myself. He said he had thrown Government property, government tools and equipment down the well.

Cross Examination

He just mentioned he boxed up a box of tools and threw them down the well and then took him over to the well and I had a powerful flashlight and I could see some of those tools down there, oxygen regulators and files. Mr. McElheny told me and he stated to the intelligence officer that he be-

(Testimony of Arthur Chandler.)

came frantic and scared. That was the reason for throwing Government property down the well. The well is in such a condition it is impossible for a human being to go down there because of gas condition, it is an old dug well and can cave in at any time. We didn't feel safe to send anybody in there. It is not cased in and is in loose dirt, and with that well over eighty feet deep we weren't sending anyone down there to get the government property. It's a long way down there to determine the exact nature, but you could see they were parts of oxygen regulators and Mr. McElheny told me they were oxygen regulators. I would say they were the same size as that you have exhibited to me, because I could see very plainly the size. I cannot say whether they were in use at McClellan Field at that time or not. He made the statement at several different times, both out at the well and at the Intelligence Office. I heard the statement on the 23rd day of November and I heard the same statement on the 24th day of November.

Whereupon both plaintiff and defendant rested their respective cases.

The foregoing was all the evidence offered, heard or admitted by either side in this case. [49]

Whereupon the Court orally announced in open Court that:

"I find the defendant guilty on the First Count of the Indictment and not guilty as to the Second, Third, Fourth, Fifth and Sixth Counts."

Whereupon Counsel for defendant moved for a dismissal of the Second, Third, Fourth, Fifth and Sixth Counts of the Indictment, which motion was then and there granted by the Court, and said Second, Third, Fourth, Fifth and Sixth Counts were dismissed.

Whereupon counsel for defendant immediately filed written Motion for a New Trial as follows, to-wit:

[Title of Court and Cause.]

Comes now the defendant, Clinton B. McElheny, and files this as and for his Motion to the Court to grant him a new trial in the above entitled action under the indictment heretofore presented to this Court by the Grand Jury and upon the following grounds of error occurring during the trial of said cause and objected or excepted to by the defendant.

That the grounds upon which this Motion is based are as follows:

I.

Error in law in denying defendant the right to prove that the tools described in said indictment came lawfully into his possession under the rules and regulations of the military authorities of McClellan Field who have exclusive jurisdiction over all persons employed on said Field and whose rules and regulations are supreme thereon.

II.

Error in law in denying defendant the right to prove that under said rules and regulations, the McClelland Field Command does actually issue and deliver to civilian employees tools and equipment on (a) memorandum receipts; (b) omar tickets and (c) as expendable items without receipts or tickets; and that such methods [50] so provided are the only means under which workmen and employees generally and this defendant could obtain tools and equipment with which to work.

III.

Error in law in denying defendant the right to prove that employees of McClellan Field were lawfully permitted under the rules and regulations of the army command at said Field to take from the Field to their respective homes, tools of the Field for private use.

IV.

Error in law in denying defendant the right to prove that employees of McClellan Field were lawfully allowed and permitted to take tools and equipment from said Field under a pass.

V.

Error in law in admitting alleged confessions of the defendant obtained under duress and while defendant was held in technical custody without warrant.

VI.

Error in law in refusing to consider or recognize the Articles of War and in particular Article II and Section 80 thereof.

VII.

Error in law in presuming from the mere fact of possession that each article named in the indictment was a matter of law stolen by this defendant.

VIII.

Error in law in allowing and permitting introduction of evidence in the first instance without identification and with no support other than alleged confessions of defendant.

IX.

Error in law in admitting evidence not identified as having been taken from McClellan Field and founded upon similarity alone.

This motion is made and based upon all the files, papers and [51] records on file in said action and upon all evidence and testimony introduced at the trial.

Dated: February 18, 1944.

CHAS. L. GILMORE,
Attorney for Defendant.

Whereupon the Court denied Motion for a New Trial.

Thereupon the Court immediately pronounced sentence upon defendant as follows, to-wit:

That the defendant, Clinton B. McElheny be imprisoned in the County Jail for the period of one year.

Whereupon defendant gave oral Notice of Appeal with the oral statement that written Notice of Appeal would be filed within five days.

Whereupon the defendant moved for admission to bail pending appeal, which motion was by the Court immediately denied.

Thereafter on the 8th day of March, 1944, and within the time allowed by the Rules of Criminal Procedure, the appellant, defendant below, duly tendered this his Bill of Exceptions herein, which having been seen and examined by the Court and Counsel for plaintiff, is by the Court allowed and approved by the Honorable Martin I. Welsh, the Judge of the United States District Court for the Northern District of California, Northern Division and the same is ordered by said Court to be filed as and for the Bill of Exceptions and made a part of the record herein, which is now accordingly done.

Given under the hand of the Judge of said Court before whom said proceedings were had this 17th day of March, 1944.

MARTIN I. WELSH,
Judge of the United States District Court for the Northern District of California, Northern Division. [52]

The above and foregoing Bill of Exceptions is hereby approved this....day of March, 1944.

FRANK J. HENNESSY,
United States Attorney,

By
Assistant United States Attorney.

CHAS. L. GILMORE,
Attorney for Defendant.

[Endorsed]: Filed March 17, 1944. [53]

[Title of District Court and Cause.]

ORDER DIRECTING THAT PHYSICAL EXHIBITS BE TRANSMITTED TO APPELLATE COURT

It appearing to the Court that the original physical exhibits admitted or offered in evidence in the above cause, should be inspected by the United States Circuit Court of Appeals, for the Ninth Circuit, as part of the record of the above named defendant on appeal in said cause;

It Is Ordered that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the original physical exhibits offered or received in evidence during the trial of the above entitled action.

Dated: March 17, 1944.

MARTIN I. WELSH,
Judge.

[Endorsed]: Filed March 17, 1944.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 88 pages, numbered from 1 to 88, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Clinton B. McElheny, No. 8637, Cr., as the same now remain on file and of record in this office.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Eighteen and 55/100 ($18.55) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 22nd day of March, A. D. 1944.

[Seal] C. W. CALBREATH,
Clerk.
By F. M. LAMPERT
Deputy Clerk.

[Endorsed]: No. 10690. United States Circuit Court of Appeals for the Ninth Circuit. Clinton B. McElheny, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed March 23, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10690

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

CLINTON B. McELHENY,
Defendant and Appellant.

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD

Notice is hereby given that Clinton B. McElheny, appellant in the above action, intends to rely on the Assignments of Error appearing in the transcript of record in the above cause, as his Points

on Appeal and hereby adopts such Assignments as such Points on Appeal, and that the entire transcript as certified by the Clerk of the District Court be printed as the record on appeal in said cause.

Dated: March 24, 1944.

CHAS. L. GILMORE,
Attorney for Defendant and Appellant.

Due service by copy of the within Statement and Designation admitted this 24 day of March, 1944.

EMMET J. SEAWELL,
Asst. U. S. Attorney,
Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Mar. 25, 1944. Paul P. O'Brien, Clerk.

No. 10,690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON B. McELHENY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

BRIEF FOR APPELLANT.

CHAS. L. GILMORE,
Capital National Bank Building, Sacramento, California,
Attorney for Appellant.

FILED
MAY 11 1944
PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
The Court Has Jurisdiction	1
Statement of Proceedings Had	1
Statement of the Case	2
Assignments of Error Nos. 1, 2, 3, 4, 5, 6 and 7	5
Assignment of Error No. 8	6
Assignment of Error No. 9	7
Assignment of Error No. 10	9
Assignment of Error No. 11	11
Assignment of Error No. 12	13
Assignment of Error No. 13	14
Assignment of Error No. 14	16
Assignment of Error No. 15	16
Assignment of Error No. 16	17
Assignment of Error No. 17	18
Assignment of Error No. 18	18
Assignment of Error No. 19	19
Assignments of Error Nos. 20, 21 and 22	20
Assignments of Error Nos. 23 and 24	20
Assignment of Error No. 25	22
Assignment of Error No. 26	22
Assignment of Error No. 27	24
Conclusion	24

Table of Authorities Cited

Cases

	Page
Anderson v. United States, 318 U. S. 350, 63 Sup. Ct. 599..	11
Caha v. United States, 152 U. S. 211, 38 Law. Ed. 415, 14 Sup. Ct. 513	13
Chambers v. State of Florida, 309 U. S. 227, 60 Sup. Ct. 472	11
Dodson v. United States, 23 Fed. (2d) 401	23
Hines v. Mikell, 259 Fed. 28, 170 C. C. A. 28	8
In re Bogart (C. C. Cal.), 3 Fed. Cas. No. 1596, 2 Sawy. 396	9
In re Stubbs (C. C. Wash.), 133 Fed. 1012	8
Johnstone v. United States, 1 Fed. (2d) 928	11
McClaughry v. Deming, 186 U. S. 49, 46 Law. Ed. 1049, 22 Sup. Ct. 786	9
McNabb v. United States, 318 U. S. 332, 63 Sup. Ct. 608...	11
Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494..	11
People v. Beaver, 49 Cal. 57	22
Runkle v. U. S., 122 U. S. 543, 30 Law. Ed. 1167, 7 Sup. Ct. 1141	8
Turner v. United States, 25 Fed. (2d) 1023	23
U. S. v. Smith, 197 U. S. 386, 49 L. Ed. 801, 25 Sup. Ct. 489	8

Codes

California Penal Code, Section 825	10
California Penal Code, Section 849	10
5 U. S. C. A., Sec. 300a	10
10 U. S. C. A., Secs. 1517-1519	9
28 U. S. C. A., Sec. 225	1

Texts

18 Am. & Eng. Ency. of Law, 2d, p. 469	13
18 Am. & Eng. Ency. of Law, 2d, p. 498	13

Pages
18 Am. & Eng. Ency. of Law, 2d, p. 500 15

6 C. J. S., Sec. 54 (C), p. 448 8

1 Wharton Crim. Ev., Sec. 191, p. 199 12
1 Wharton Crim. Ev., Sec. 191, p. 201 12, 22
1 Wharton Crim. Ev., Sec. 206, p. 226 11

Miscellaneous

Articles of War, Article II 8

3 Op. Atty. Gen. 397, 544 8

Rules of Practice and Procedure, Rule III 1

No. 10,690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON B. MCELHENY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

BRIEF FOR APPELLANT.

THE COURT HAS JURISDICTION.

The United States of America is plaintiff, the indictment charges criminal offenses, and the judgment and sentence are final. This Court has jurisdiction of this appeal under 28 U.S.C.A. Sec. 225 and Rule III, Rules of Practice and Procedure after Verdict of Guilty.

STATEMENT OF PROCEEDINGS HAD.

Appellant, employed at McClellan Field near Sacramento, California, since June, 1939, and as Assistant

(Note): The letter "T" in parentheses followed by a number, refers to the page of the printed Transcript of Record.

Superintendent, Air Craft Shops, since October 13, 1942, was charged by indictment returned January 7, 1944 (T. 2) in Count One thereof, with having taken and carried away on or about January 1, 1942, with intent to steal or purloin the same, certain small tools therein described, and in Counts Two, Three, Four, Five and Six, with unlawfully having the same tools in his possession on or about November 24, 1943, with intent to convert the same to his own use and gain.

Appellant was arraigned January 12, 1944, pleaded Not Guilty on all Counts, waived a jury, and was tried to the Court, February 16 and 17, 1944.

The trial Court found him guilty on Count One, not guilty on Counts Two, Three, Four, Five and Six, dismissed them, denied Motion for New Trial and sentenced him to One Year in the County Jail.

Notice of Appeal was timely filed, Bill of Exceptions and Assignment of Errors were lodged with the trial Court March 8, 1944, and the Bill of Exceptions was settled and approved by the trial Court March 17, 1944.

STATEMENT OF THE CASE.

Appellant entered the employ of the U. S. Army Air Corps at Rockwell Field, near San Diego, March 1, 1929 (T. 62), and was transferred to McClellan Field in June, 1939. In transferring, he shipped and brought a lot of tools, some of which were his own, and some belonged to the Air Force.

(T. 64.) Some were charged to him on memorandums (T. 64), in accordance with the method used in these Fields and established by the U. S. Army. Some was expendable material which he had put in a box and had taken to his home when he was promoted to Assistant Superintendent for the reason he had no place to keep them (T. 71).

All these, except expendable material, were charged to him on memorandums issued by the tool room at the Field. He was working fourteen hours a day, had to stay on the job to meet three shifts and could not get his memorandums cleared (T. 71).

He carried tools to and from his work and it never occurred to him he was committing a crime in so doing (T. 72).

Much of the equipment, in fact all save ten pieces, itemized in the indictment could not be identified as property of the United States, yet was admitted in evidence over objections of appellant's counsel, as U. S. Exhibit 12 (T. 62). Some of this equipment was charged to defendant and he had paid the Field for it (T. 81). That may have been wrong, but it was the system established and enforced by the Air Corps.

Some belonged to the defendant personally (T. 77). He had those items in his possession from sixteen to eighteen years (T. 77). The drills and taps were standard tools not marked or identified as property of the United States (T. 46). Similar testimony as to the other tools was ruled out by the trial Court (T. 47).

A box of tools consisting of old type carbon drills, dies, collets, reamers and files admitted in evidence as U. S. Exhibit 12 (T. 62) over objection of appellant's counsel, were without any identifying marks and admitted on the statement of witness Park that he had never seen them on the Field and did not know as a fact, they came from McClellan Field (T. 51). The only identifying evidence or testimony offered by plaintiff was that they were similar to articles at McClellan Field (T. 51). The testimony and evidence as to the other exhibits of tools were the same.

For three days appellant was held in technical custody (T. 45, 85), although it developed at trial he was not actually under arrest. He was made to understand, however, that he was detained.

During this period he was hailed before what he was advised was a court martial proceeding, advised by a Lieutenant Ark that it was a court martial as shown by U. S. Exhibit 10 (T. 55), and also advised by a Captain Pearce (T. 85) who read the Articles of War to appellant. Out of this hybrid proceedings, which plaintiff endeavored to repudiate, a so-called confession (U. S. Exhibit 10) was obtained from appellant.

The second day of this restraint appellant took witness Chandler to appellant's home where the lot of tools set forth in the indictment was pointed out to Chandler. Appellant had, during the August previous, told the Intelligence officers at the Field he had some tools at home (T. 82) and was endeavor-

ing to clean up his memorandums. At no point is this statement denied or even challenged.

On the third day he was "invited" to come to the office of an F. B. I. Agent, Mr. Moehle (T. 57), where another "confession" was obtained (T. 58). This "confession" was admitted in evidence over objection of appellant's counsel as U. S. Exhibit 11 (T. 58), and without the list of articles, was read into the record.

Thereafter appellant was discharged from his employment on November 25, 1943 (T. 63).

Although the "confession" obtained at the pseudo-court martial shows some tools were taken from the Field by appellant on a pass, all testimony and evidence offered by defendant relating to a pass for tools was ruled out by the trial Court (T. 94).

ASSIGNMENTS OF ERROR Nos. 1, 2, 3, 4, 5, 6 AND 7.

The Court erred in admitting U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7 and 8.

We have grouped these seven Assignments for the reason they refer to physical exhibits, the testimony referring to them being identical and came from the same witness.

These exhibits are respectively, 10-inch Wrench, Padlock, Machinist's Scriber, Pliers, Steel Tape, Wrench and Pliers.

No witness identified any of the exhibits as having been at McClellan Field; no witness ever saw them

at the Field, and no witness produced by the government could identify any of them as property of the United States as of January, 1942, or November, 1943, or as of any other time.

They were admitted on the sole ground they were similar to tools at the Field.

They were standard tools such as are used in any machinist's or mechanic's trade, purchasable anywhere, and by their very inherent nature actually are similar to McClellan Field tools exactly as they are similar to standard tools of the same form (T. 47). The padlock bore a number used a long time ago at the Field, but no longer used (T. 49). Other tools bore marks similar to the markings used at the Field (T. 50).

ASSIGNMENT OF ERROR No. 8.

The Court erred in admitting U. S. Exhibit No. 9, a miscellaneous lot of tools (T. 50).

This exhibit consisted of a lot of worn and rusted wrenches, files, and a hodge-podge of odds and ends such as is found around the home shop of any machinist. This lot was without any identifying marks whatever that could fix their place of origin as McClellan Field. They were admitted on the sole ground of similarity (T. 51). The only witness who made any pretense of identifying them stated he never saw them until the morning of the trial (T. 51).

ASSIGNMENT OF ERROR No. 9.

The Court erred in admitting U. S. Exhibit No. 10 (T. 54) over the objections of appellant, as follows:

1. It was hearsay evidence, did not contain all the evidence and statements obtained and made during the session of the Summary Court and was an extra-judicial confession obtained by trick and ruse and without any foundation having been laid for its introduction.

2. Its nature was highly prejudicial to the appellant.

This exhibit consisted of a purported "confession" by appellant taken at McClellan Field November 24, 1943.

The opening paragraph of this statement is ample to damn it as a confession obtained by trick artifice and fraud:

> "I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths without any threats, coercion or promises of any immunity, do swear and affirm that the statement I am about to make is a true statement."

The jurat to the statement is further proof of appellant's claims:

> "Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A.C., Summary Court Officer".

Civilian personnel of army camps are subject to Court Martial under Article II of Articles of War.

6 *C. J. S.,* Sec. 54 (C), p. 448.

Civilians on duty with armies in the field in time of war, include civilians serving in cantonments or training camps within or without the United States.

Hines v. Mikell, 259 Fed. 28, 170 C. C. A. 28.

That the whole proceeding under which this purported confession was obtained was one calculated by the army officers in charge, to impress appellant with the idea that he was actually being court martialled. The officers knew that they were endeavoring to trick and did trick the appellant.

The specifications of charges must be served on the accused within eight days after his arrest.

U. S. v. Smith, 197 U. S. 386, 49 L. Ed. 801, 25 Sup. Ct. 489.

The defendant must be informed of the charge against him in language sufficiently clear to inform the accused of the offense for which he is tried and to enable him to prepare his defense.

In re Stubbs (C. C. Wash.), 133 Fed. 1012.

The record must show the oath as having been administered to each member of the Court before commencement of the trial.

3 Op. Atty. Gen. 397, 544.

There are no presumptions in favor of regularity of courts martial.

Runkle v. U. S., 122 U. S. 543, 30 Law. Ed. 1167, 7 Sup. Ct. 1141.

There is no trial at court martial until the reviewing and confirming authority has taken final action on the case.

10 *U. S. C. A.,* Secs. 1517-1519;

In re Bogart (C. C. Cal.), 3 Fed. Cas. No. 1596, 2 Sawy. 396.

If any one of the statutory requirements is not followed by the court martial, the whole proceeding is void.

McClaughry v. Deming, 186 U. S. 49, 46 Law. Ed. 1049, 22 Sup. Ct. 786.

ASSIGNMENT OF ERROR No. 10.

The Court erred in admitting U. S. Exhibit No. 11 (T. 58).

This is another "confession" obtained by an F. B. I. agent from the appellant on November 29, 1943, five days after the pseudo court martial.

This statement was admitted over the objections of Counsel for appellant on the grounds:

1. That it was and is incompetent to prove any of the issues of this case.

2. That it was and is hearsay.

3. That it is in form an extrajudicial statement for which no foundation had been laid.

4. That it was highly prejudicial to defendant.

As we have shown under Assignment of Error No. 9 the appellant was first subjected to a so-called court

martial on November 24. On November 29, U. S. Exhibit No. 11 was elicited from the appellant by an F. B. I. agent.

Appellant was not under arrest at any time although he was advised and informed that he was. He had no way of determining whether he was still subject to the court martial proceedings when he was "invited" to go to the F. B. I. office. He had been under very close surveillance November 23rd, 24th and 25th and so far as we can glean from the record had been closely questioned between the 25th and 29th. At least the F. B. I. agent had to approach appellant some time between those days in order to extend the "invitation" for the visit.

The officers of the Federal Bureau of Investigation are authorized to make arrests and the Statute requires that "The person arrested shall be immediately taken before a committing officer".

5 *U. S. C. A.*, 300a.

The laws of the State of California provide that when an arrest is made without a warrant by a peace officer or private person, the person must without unnecessary delay be taken before a magistrate.

California Penal Code, Section 849.

If the arrest is made, he must be taken before the magistrate within two days.

California Penal Code, Section 825.

A confession obtained under duress by an F. B. I. agent without an arrest of the accused is sufficient

ground of and in itself for reversal of the judgment and verdict.

McNabb v. United States, 318 U. S. 332, 342, 63 Sup. Ct. 608, 613;

Anderson v. United States, 318 U. S. 350, 355, 63 Sup. Ct. 599, 601.

A confession obtained under similar circumstances after five days of interrogations and admitted in evidence has been sufficient cause for reversal.

Chambers v. State of Florida, 309 U. S. 227, 239, 60 Sup. Ct. 472, 478.

This is not a new rule. It has long been the protecting arm established by the Constitution.

Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494, 498.

Where confessions appear to have been made to persons in authority, the burden is upon the prosecution to prove that they were voluntary.

1 *Wharton Crim. Ev.,* Sec. 206, p. 226;

Johnstone v. United States, 1 Fed. (2d) 928.

ASSIGNMENT OF ERROR No. 11.

The Court erred in admitting U. S. Exhibit No. 12 (T. 62), a box of tools. Objections to its admission were timely made on the grounds:

1. There was no identification of any of the tools as having ever been at McClellan Field or had ever been owned by or in possession of the United States and no evidence independent of the extrajudicial con-

fessions of defendant connecting the appellant with any of the tools in such exhibit.

2. They were admitted solely on the ground they were similar to tools at McClellan Field and therefore the Court indulged in a presumption of guilt as the basis.

The testimony showed they were found in possession of appellant. However, mere possession of stolen goods unaccompanied by other evidence of guilt is not to be regarded as *prima facie* evidence, even of burglary.

1 *Wharton Crim. Ev.,* Sec. 191, p. 201.

> "The possession of the stolen goods must be personal, recent and unexplained and must involve a distinct and conscious assertion of property by the defendant".
>
> 1 *Wharton Crim. Ev.,* Sec. 191, p. 199.

The charge set up in the indictment is that appellant stole the tools on or about January 1, 1942, and since he was found Not Guilty of possession of the tools and all counts of the indictment relating to possession were dismissed, then the evidence here presented must be viewed in the light of the single count of the indictment, to-wit: that he did on or about January 1, 1942, take and carry away personal property of the United States with intent to steal and purloin the same.

Obviously to support such a charge, there ought to be at least some identification of the article or articles as being the personal property of the United States.

The taking, in order to support a charge of larceny, must be against the will of the owner or at least without his consent. In other words, the act of taking must be a trespass against the owner's possession.

18 *Am. & Eng. Ency. of Law,* 2d, p. 469.

Further, the thing taken and carried away must be the property of another.

18 *Am. & Eng. Ency. of Law,* 2d, p. 498.

ASSIGNMENT OF ERROR No. 12.

The Court erred in sustaining objections on the grounds of incompetency, immateriality and irrelevancy to the testimony of the appellant in attempting to show the method and means provided by the Field to return tools upon transfer to another position on the Field (T. 73).

Appellant had testified up to the point where he partially showed the regulations of the Army under which he was required to work, but he was prohibited from showing the entire setup as to how tools could come into his possession and the means and methods provided at the Field for getting them out of his possession. The regulations of the Army are as much the law as any statute of Congress, particularly as concerns civilian employees on that field.

The rules and regulations of governmental agencies "become a mass of that body of public records of which the Courts take judicial notice".

Caha v. United States, 152 U.S. 211, 38 Law. Ed. 415, 14 Sup. Ct. 513, 517.

Therefore, in this case the Court erred in failing and neglecting to take judicial notice of those regulations in force at the Field and under which all civilian employees must serve and which regulations provide the only means at the Field whereby an employee can obtain tools with which to work or can obtain tools to take from the Field.

ASSIGNMENT OF ERROR No. 13.

The Court erred in sustaining objection to introduction in evidence of demand of McClellan Field against appellant in the sum of $61.24 to cover value of lost tools, which demand appellant received through the mails (T. 77).

This evidence was competent to further show the system established by the Army under which employees were issued tools and if they were not returned, the value of tools were charged against the employee and he had to pay for them. Such evidence would further show that there was no intent on the part of appellant to steal any tools and also to show that any tools he had which might be identified as property of the United States had come into his possession lawfully under the rules and regulations of the Field.

Counsel for appellant offered to show the Court that this was the system established and maintained at the Field, but was not allowed to introduce any evidence on the point.

Apparently the indictment itself was taken as sufficient evidence of the guilt of appellant and no further testimony or evidence was required. The course of the trial established the fact that the Court quite evidently took the two statements of the appellant, the one before the court martial and the other before the F.B.I. Agent, as absolute demonstrative evidence of the guilt of the appellant and that any statement or assertion or any other evidence offered or submitted by appellant tending to rebut either of those statements was not considered and was refused by the trial Court.

We have always understood that in any crime such as this, it must be proven that the accused acted with a felonious intent. That is, the taking and the carrying away must be with the intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently.

18 *Am. & Eng. Ency. of Law,* 2d, p. 500.

Evidently the Army knew for a long time that this appellant had tools of the United States in his possession (T. 82). The records were carried in the Field and the matter of taking or of possession was considered a mere bookkeeping routine, else the authorities of the Field would not have billed the appellant for lost tools in the sum of $61.24 (T. 78), nor have given him a receipt for $52.92 (T. 81) for tools paid for by withholding that sum from his salary.

ASSIGNMENT OF ERROR No. 14.

The Court erred in sustaining objections to introduction in evidence of 12 memorandum receipts issued by McClellan Field to appellant and listing tools contained in the indictment (T. 78-81).

The reasons why such memorandums should have been admitted are:

1. They showed that all tools named in the indictment, other than those classified as expendable and non-recoverable and other than those owned by appellant, were regularly issued to appellant under the system used at McClellan Field, for which he was charged and which he had paid for.

2. They were competent evidence to prove appellant was not guilty of stealing any of the tools.

3. They were material to his defense.

4. They were relevant to the issue of guilt or innocence of appellant.

What we have said under Assignments of Error Nos. 12 and 13 above applies equally here and repetition is unnecessary.

ASSIGNMENT OF ERROR No. 15.

The Court erred in sustaining objection to admission of Receipt No. E-N-3753, Voucher 1-12-44 issued by McClellan Field to appellant either in December, 1943, or January, 1944, showing payment of $52.92 for tools (T. 81).

The reasons why the voucher should have been admitted are:

1. That it was part of the system in use at the Field.

2. That it was competent to show the innocence of appellant of either intent to steal or felonious possession of tools.

3. That it was relevant to the issue of guilt or innocence.

4. That it was material to the defense of both theft and possession.

ASSIGNMENT OF ERROR No. 16.

The Court erred in sustaining objection to testimony of appellant as to conversation had with Captain Pearce the day following the date of the alleged "confession" set forth under Assignment of Error No. 9, above (T. 54).

The reasons this testimony and evidence should have been admitted are:

1. It showed the extent of the grilling appellant received in the effort to obtain the so-called confession.

2. It is established the fact that this appellant believed and was warranted in his belief that he was on November 25, 1943, still under court martial since its convening on the day previous.

3. It showed the so-called confession was obtained pursuant to third-degree methods.

4. It was competent to show the whole course of the investigation to which this appellant was subjected.

5. It was relevant and material to show the whole of this third-degree proceeding which appellee had opened up in its case in chief.

We have treated this "confession" and the grilling appellant received before, during and after its date under Assignments of Error Nos. 9 and 10, and we need not add to those arguments.

ASSIGNMENT OF ERROR No. 17.

The Court erred in striking out the testimony of appellant regarding being in custody of Mr. Chandler (T. 86).

This is part of the showing of appellant in support of his showing none of these alleged "confessions" bore the least semblance to being voluntary. We have argued the points under Assignments of Error Nos. 9 and 10.

ASSIGNMENT OF ERROR No. 18.

The Court erred in sustaining objection to introduction in evidence of appellant's Exhibit "K" for identification: Pass for tools (T. 94).

The reasons why this evidence should have been admitted are:

1. It was competent to show the system in use at the Field under which employees were permitted to take tools from the Field.

2. It was relevant to the defense of appellant as showing tools could be off the Field and yet lawfully in possession of that individual.

3. It was material to the defense of appellant as showing that persons other than appellant were permitted to take tools from the Field to the homes.

In appellee's Exhibit No. 10 (T. 55) it will be noted that reference is made to articles given appellant on a pass to be taken from McClellan Field.

Since appellee had opened the question in its case in chief, appellant should have been accorded an opportunity to show how tools were given workmen on pass and taken from the Field with no time or date set for their return.

This evidence was essential in defense to show utter absence of any felonious intent in taking tools from the Field.

ASSIGNMENT OF ERROR No. 19.

The Court erred in sustaining objection to testimony of witness Dudley regarding expendable tools, on the sole ground that appellant had already testified on the same point (T. 95).

We were certainly entitled to show, by independent proof, that employees other than appellant were allowed to take government property away from the

Field; that such practice was well established; that it was routine, and that such person could hardly be held guilty of stealing.

Obviously, the Court presumed the appellant guilty as charged in the indictment.

The rejected testimony was proof of absence of felonious intent. True, it should not devolve upon a defendant to make such proof, but here it was. This appellant was tried under the theory that the indictment was proof of guilt and it was up to him to prove his innocence.

That being the case, appellant was entitled to present all evidence germane to his claim of not guilty and it was highly prejudicial error to deny him that privilege.

ASSIGNMENTS OF ERROR Nos. 20, 21 AND 22.

We have grouped these assignments as they all refer to the same elements, namely: the grant of the right of employees to take tools from the Field to their homes.

We have covered our objections under Assignment of Error No. 19, and need not repeat them here.

ASSIGNMENTS OF ERROR Nos. 23 AND 24.

The Court erred in sustaining objection of counsel for appellee on grounds it was incompetent, irrelevant and immaterial and no bearing on the guilt or inno-

cence of appellant to question asked of witness Dudley as follows (T. 97):

"Q. Do you know whether tools and equipment on the Field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them?"

The Court erred in sustaining objection of counsel for appellee on grounds it was incompetent, irrelevant and immaterial, no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows (T. 97):

"Q. Do you know of your own knowledge whether an employee prior to August, 1943, could obtain a pass from the authorities to take any of that material or tools from the junk pile or fire pit and take it off the Field".

Where the Army discards material, it is common knowledge that it is either sold or junked. Appellant should have been accorded the right of proving this system was established and carried on at McClellan Field.

If the Army was violating some law, appellee should be prosecuting it. It may have been that this evidence was closely approaching that proof and for that reason must be kept from the record.

Why this appellant should be adjudged guilty of theft because he had lawfully in his possession certain articles claimed to have been stolen is stretching legal logic to a remarkable degree.

ASSIGNMENT OF ERROR No. 25.

The Court erred in rejecting the offer of proof of appellant to show that a foreman issuing tools to workmen would find himself with two of the same kind, as one workman would turn in the bit of a drill and another the shank and be reissued two drills. When the workmen quit or were transferred, the foreman would have two drills, was charged with one only, and he could never return the other (T. 98).

The proof should have been received because:

1. It was competent to show that tools from the Field found in the possession of any person off the Field, are not evidence either of theft or of unlawful possession.

2. It was relevant and material to the defense as showing absence of any criminal intent when tools were found in possession of this appellant.

Mere possession of the articles without evidence of felonious taking by appellant or some other person is no evidence of theft.

1 *Wharton Crim. Ev.,* Sec. 191, p. 201;
People v. Beaver, 49 Cal. 57, 58.

ASSIGNMENT OF ERROR No. 26.

The Court erred in finding appellant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts.

1. The only evidence that could possibly connect the appellant with any crime was the fact he had tools in his possession.

2. To omit all evidence of possession from the case would leave nothing whereon to base a charge of theft.

3. To convict of theft alone necessitates indulging in a presumption of guilt, a presumption of intent, a presumption against reasonable doubt, resulting in a conviction founded solely upon presumptions based upon presumptions.

If a presumption of innocence follows a defendant throughout the trial and if all doubts and uncertainties are to be resolved in his favor, then this appellant is entitled to have considered the utter absence of evidence of theft and of intent to steal viewed in the light of the determination by the trial Court that appellant was not guilty of having the same articles in his possession.

This presumption of innocence "is not a will-o'-the-wisp, which appears and disappears as the trial progresses. The presumption does accompany the accused through every stage of the trial. And it is a presumption of law to be considered by the jury. Although not strictly evidence, it is in the nature of evidence in favor of the accused."

Dodson v. United States, 23 Fed. (2d) 401 (followed in *Turner v. United States,* 25 Fed. (2d) 1023).

ASSIGNMENT OF ERROR No. 27.

The Court erred in refusing appellant a new trial on the grounds set forth in the written motion filed (T. 101).

Our preceding assignments of error have sufficiently covered this point.

CONCLUSION.

We submit that every inference or presumption of innocence of appellant was eliminated at the trial of this cause.

The question of reasonable doubt was never considered at any stage of the proceedings.

Obviously, the indictment was considered as evidence of appellant's guilt and any evidence that might tend to disprove it was barred by the trial Court.

The trial Court believed that the possession by appellant of the articles described in the indictment was sufficient to convict appellant of the first count thereof, as that is the only evidence of theft appellee could establish. No witness ever saw any of those articles at McClellan Field and no witness testified he, personally, knew any of those articles were missing from the Field. No person saw appellant take any of them from the Field, and no witness was produced who ever heard the appellant say he stole them or that he took them away with intent to keep them or convert them to his own use.

On its face the whole proceeding was far from attaining the dignity of a prosecution for a real crime.

The appellant had been employed by the Air Corps of the Army since March 1, 1929. At the time of his discharge he was Assistant Superintendent, Air Craft Shops (T. 63). As such he supervised the work of eighteen general foreman, thirty-seven assistant general foreman, and approximately fifty-five hundred Air Craft Shops employees (T. 72).

A thief could hardly have risen from a welder to such a responsible position. There is not a mark against his name on the rolls of the Air Corps.

Appellant was charged with and convicted of a crime of plain theft of a lot of battered, rusty tools, not one of which any mechanic would use in his daily work, and no foreman would permit use of at any time, yet appellant was found not guilty of having them in his possession. If they had been stolen, would he not likewise be guilty of having stolen goods in his possession? And if they were not stolen goods and appellant was not guilty of having them, then it must follow as a natural corollary that he was lawfully in possession. There is no middle ground here. Either appellant was lawfully entitled to the possession of the articles or he was not. Therefore, he could not be guilty of theft of something found to be lawfully in his possession.

There may be some error in our legal reasoning here, but careful analysis of the problem fails to indicate it.

We cannot follow reasoning that resolves that one can be guilty of stealing that which he is lawfully possessed of.

We believe our appeal is well founded in fact and that ample grounds exist for reversal.

We therefore pray that the judgment of conviction be set aside and reversed and that appellant be discharged from custody.

Dated, Sacramento, California,
May 10, 1944.

Respectfully submitted,
CHAS. L. GILMORE,
Attorney for Appellant.

No. 10,690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON B. MCELHENY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Statement of the Case	1
Position of the Government	8
Argument	8
Conclusion	19

Table of Authorities Cited

Cases

	Page
McNab v. United States, 318 U.S. 332, 63 Sup. Ct. 608	8

Codes

5 USCA, Sec. 300(a)	12
10 USCA, Sec. 1495	11
18 USCA, Sec. 101	18

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vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts in this case are as follows:

The appellant had been a Government employee at San Diego in the year 1929, was transferred to the Sacramento Air Depot, McClellan Field in 1939 and remained at the latter place from 1939 until November 25, 1943. When first transferred to McClellan Field he was employed as a mechanic supervisor. On April 6, 1942 he was appointed group superintendent of the Maintenance Group. On September 1, 1942 he was

(NOTE): All references herein are to Reporter's Transcript, except as otherwise noted.

made general foreman of Aircraft Shops, and on October 13, 1942 he was made assistant superintendent of Aircraft Shops, which position he held until the termination of his employment on November 25, 1943. It should also be pointed out that appellant testified that he had charge of the "whole Maintenance Division at McClellan Air Field and that that Division covered an area of some 15 to 20 acres". (T. p. 107, lines 17-20.)

Thereafter, on the 7th day of January, 1944, appellant was indicted by the Federal Grand Jury of the Northern Division, Northern District of California, at Sacramento, in an indictment containing six counts. However, the appellant was only found guilty and sentenced on the first count of the indictment, which charged him with theft of Government property from McClellan Field, and we will not reiterate that count of the indictment as it is set out in full on page 2, et seq., of the Printed Transcript of Record. Therefore, we will confine ourselves throughout this brief to evidence in respect to the first count of the indictment. A brief summary of the evidence is as follows:

The first witness called in behalf of the Government was Mr. Arthur Chandler, Investigator for the Air Service Command with headquarters at the Sacramento Air Depot, McClellan Field, California, who testified that he had a conversation with the appellant on the 23rd day of November, 1943, in the presence of Captain Ark, Sergeant Hubbs and Andrew Cecchettini, in regard to certain Government property; that the appellant at that time advised the witness that he had taken to his home property that belonged to the

United States Government, and that he would be willing to take the investigator to his home for the purpose of determining what property in his home belonged to the Government, and that he would turn over to the investigator all property that belonged to the Government. (T. p. 3, lines 8-24.) Mr. Chandler accompanied the appellant to the latter's home and together they made an examination of a box of tools found in a bedroom of the house, and also of some tools found in a barn and house trailer in the rear of appellant's home. The tools so found on appellant's premises were in Court at the time of the trial and Witness Chandler identified such tools as having come from the appellant's premises under the circumstances hereinabove set forth. (T. pp. 4, 5, 6.)

The appellant also stated to Mr. Chandler that he had disposed of other Government property, such as tools and equipment, by throwing them down a well, and he took Mr. Chandler to the well and he, Chandler, could actually see the Government property on the bottom of the well, which was approximately 80 feet in depth.

The appellant also stated to Chandler that the reason he had thrown the Government property down the well was that he had become frantic and scared. (T. pp. 125-127.)

Warren Wilford Parker was next called by the Government. He testified that he was Supervisor in Charge of Tool Issue at McClellan Field, that he had been employed in that capacity for the past five years. This witness specifically identified a number of articles

set forth in the first count of the indictment, as follows: A 10″ steel wrench (T. p. 10) which bore marks "U.S. Army". This is the wrench set forth in the indictment. (p. 8 of the Printed Transcript of Record.) He testified that the padlock which was introduced as Government's Exhibit No. 3, which bears the number "155", was similar to the padlocks used at McClellan Field and bore the same number as the padlocks used at McClellan Field. (T. p. 12, lines 2-9.) Witness Parker next identified Government Exhibit No. 4, "machinist's double point nine inch scriber", by the marks "U.S.A." upon it. This item is set forth in the indictment at page 6 of the Printed Transcript of Record. This witness likewise identified a pair of pliers marked "U.S." (Gov. Ex. No. 5), as coming from McClellan Field. (T. p. 13, lines 13-23.) He identified a steel tape (Gov. Ex. No. 6), marked "Air Corps, U.S. Army", as coming from McClellan Field. (T. p. 14, lines 3-10.) He further identified an 8″ steel wrench marked "U.S.A." as coming from McClellan Field. (T. p. 14, lines 16-23; Gov. Ex. No. 7.) This witness identified a second pair of pliers by the mark "U.S." and identified such pliers as coming from McClellan Field. (T. p. 15, lines 3-18; Gov. Ex. No. 8.)

The foregoing tools and items are described in the indictment as it appears at page 6 of the Printed Transcript of Record.

The witness then identified a paper bag containing tools, all of which bore marks "U.S.A.", and stated that they were similar to tools so marked at McClellan Field, and these were the same tools that Wit-

ness Chandler identified as having taken from the appellant's home on November 23, 1943. (The paper bag of tools was marked Government's Exhibit No. 9 and testimony concerning it appear in T. p. 15, commencing at line 10 and ending at p. 16, line 22.)

This same witness further identified a box of tools and equipment which he stated he had examined and which he could identify as being similar to tools and equipment in stock as Government property at McClellan Field. (T. p. 16, line 3, and p. 17, line 19.)

The next witness called was Max V. Hubbs, a Sergeant at McClellan Field, attached to the Intelligence Department of the United States Air Forces. He testified that at the direction of Captain Ark he prepared a statement in longhand given to the Captain by the appellant, and that he, the witness, had written it up, and that the appellant read it and signed it "Clinton B. McElheny". The statement (Gov. Ex. No. 10), reflects the appellant's admission that the articles recovered by Mr. Chandler at appellant's home on November 23, 1943 were articles of Government property, and in addition to the articles recovered, the appellant in the statement sets forth a list of articles and equipment which he stated he disposed of on November 21, 1943. The articles disposed of by the appellant were the articles which were shown to Mr. Chandler at the bottom of the well. The statement further sets forth some articles which the appellant says were given to him on a pass to be taken from McClellan Field. (T. pp. 31-32.)

The importance of appellant's statement in respect to articles given or issued to him on a pass to be taken from McClellan Field will be developed in the argument to follow in relation to that portion of appellant's defense respecting his purported authority to take the articles listed in the indictment from McClellan Field.

The next witness called was Walter E. Moehle, Special Agent of the Federal Bureau of Investigation, who testified that he, after learning of the alleged theft of property by the appellant from McClellan Field, invited the appellant to come to his office in the Post Office Building at Sacramento, California. The appellant called at Mr. Moehle's office in the afternoon of November 29, 1943, and at that time gave a statement to Mr. Moehle, which was as follows:

> "I, Clinton B. McElheny, make this statement to Walter E. Moehle, whom I know to be a special agent of the Federal Bureau of Investigation. I have been advised I need not make this statement; and no threats or promises have been made to me. I know it may be used in court.
>
> "I have been a civilian employee of the War Department since 1929. I came to the Sacramento Air Depot in 1938 when Rockwell Field, San Diego, was moved to Sacramento, California. I was assistant general superintendent of the Maintenance Division. On or about December 15, 1941, or January 1942 I removed from the Sacramento Air Depot the items listed below and listed on the sheet identified as List Number 1, Pages 1, 2, 3 and 4. Since about January 1942 I have removed small items, as an occasional nut, bolt, screw and so forth.

"50 taps, hand; 75 drills (large and small of various sizes); 25 files; 25 reamers.

"Most of these items were in various boxes at Sacramento Air Depot and were materials charged out to me.

"I knew these items were property of the United States Government and I knew I should not have them in my possession; and was violating a federal law in so doing.

"I have read the above statement and say it is true."

Signed: "Clinton B. McElheny."

"Witnessed by: Walter E. Moehle, Special Agent, F.B.I., Sacramento, Calif., 11/29/43; Robert E. Goeke, Special Agent, F.B.I., Sacramento, Calif., 11/29/43."

(T. pp. 41, 42; Gov. Ex. No. 11.)

It should be noted that the list of articles which is attached to the statement set out above, and which is a part of Government's Exhibit No. 11, is identical with the tools which the Government alleges were stolen by the appellant from McClellan Field, and which tools and equipment were introduced into evidence as Exhibits 2 to 9, inclusive, and Exhibit 12.

Following the introduction of the statement above referred to the box of tools previously marked Government's Exhibit No. 1, identified by Witnesses Chandler and Parker, was offered in evidence as Government's Exhibit No. 12.

Whereupon appellee rested.

The appellant, McElheny, testified that he recalled throwing United States Government property down a well, and that he showed Mr. Chandler where he had thrown it.

POSITION OF THE GOVERNMENT.

It is the contention of the Government that the evidence in this case is sufficient in all respects to uphold the verdict of guilty, and, furthermore, that no confessions or admissions obtained from the appellant were in violation of the doctrine announced in the recent case of *McNab v. United States,* 318 U.S. 332, 63 S.Ct. 608.

ARGUMENT.

Appellant in his brief sets forth some twenty-seven ASSIGNMENTS OF ERROR, of which Assignments 1 to 8, inclusive, and 11, relate to the admission in evidence of certain physical exhibits, namely, tools and equipment.

ASSIGNMENTS OF ERROR NOS. 1 to 7, inclusive, refer to U. S. Exhibits numbers 2 to 8, inclusive, which consist of wrenches, padlocks, machinist's scriber, pliers and steel tape. Appellant advances the objection that none of these exhibits were identified as having been at McClellan Field, and that no witness produced by the Government could identify them as property of the United States.

It is the Government's contention that the exhibits were amply identified in the following manner: (1) by Witness Parker, who testified concerning the marks "U.S.A.", etc.; (2) by the Witness Chandler, who found them at the appellant's home or premises; (3) by the appellant himself, who informed Chandler that they were Government property taken from McClellan Field, and his further statement to Special Agent Moehle of the Federal Bureau of Investigation, wherein the appellant again reiterated the Government ownership and taking from McClellan Field.

ASSIGNMENT OF ERROR NO. 11 also refers to a box of tools in evidence as Government's Exhibit No. 12, and again appellant argues that there was no identification of the contents of the box. This exhibit contained numerous small items and it was not attempted at the trial to specifically identify each and every tool or article contained in the box. However, the witnesses Chandler and Parker both were familiar with the contents of the box, and again Chandler testified that such contents were taken from the appellant's home or premises and that he, the appellant, had informed Chandler that all the articles therein were Government property and had been taken by him from McClellan Field. Again, as in the case of Government's Exhibits numbered 2 to 9, inclusive, the appellant further stated to Special Agent Moehle of the F.B.I., that such articles were Government property taken by him from McClellan Field and that he knew the items in question were property of the United States Government, and that he knew he should not

have them in his possession, and was violating Federal law in so doing.

Appellant at page 12 of his brief cites the well established rule that possession of stolen goods, standing alone, is insufficient as *prima facie* evidence of guilt of theft. But the evidence here goes far beyond the mere possession. The possession here involves a distinct and conscious assertion by the appellant of his knowledge that they were property of the United States Government, that he took them from McClellan Field, and that he knew he was violating Federal law to so do.

In ASSIGNMENT OF ERROR NO. 8 appellant complains of the admission of U. S. Exhibit No. 9, a miscellaneous lot of tools, and characterizes this exhibit as "a lot of worn and rusted wrenches, files, and a hodge podge of odds and ends such as found around the home shop of any machinist". We submit to this Honorable Court that there is no evidence to support the appellant's characterization—in fact, it is distinctly to the contrary, as reflected by appellant's own testimony and the exhibits which are in evidence.

In ASSIGNMENT OF ERROR NO. 9 appellant complains of the admission of Government's Exhibit No. 10, which is the statement of the appellant identified by the witness, Sergeant Hubbs, on the ground it was hearsay and was an extra-judicial confession obtained by trick and ruse.

Obviously, it was not hearsay, because it was a statement made by the appellant. The appellant in his

statement that the statement was obtained by trick, artifice and fraud, is apparently contending that the trick, artifice and fraud, were an attempt to convey to the appellant the idea that he was being court martialed.

The Twenty-fourth Article of War provides as follows:

> "No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."
>
> T. 10 USCA, Sec. 1495.

As Sergeant Hubbs testified, the military authorities were simply conducting an investigation, and in so doing were informing the appellant of his rights under the Twenty-fourth Article of War, which article relates not only to military courts, but also to military officers conducting investigations.

ASSIGNMENT OF ERROR NO. 10 attacks the admission of Government's Exhibit No. 11, which is the second statement obtained from the appellant by a Federal Bureau of Investigation Agent.

Appellant in his brief at page 10 said he was not under arrest, although he was advised and informed that he was. There is nothing in the record to indicate that at the time the appellant voluntarily appeared at the Federal Bureau of Investigation office he was either under arrest or had ever been advised that he was, and there is no evidence of any duress being exerted by the Federal Bureau of Investigation to obtain the statement from the appellant. Title 5, USCA 300(a), requires that a person arrested shall be immediately taken before a committing officer, but in the instant case, at the time of appellant's visit to the Federal Bureau of Investigation office he was not under arrest and was not under any compulsion to either go to that office or to make any statement after he arrived there. As a matter of fact, he went there voluntarily, simply upon the oral request of the agent. So far as the appellant's contention that the burden is upon the prosecution to prove the confession was voluntary, assuming, without admitting that to be the law, the Government in this case actually did prove that the statement was voluntary, as the appellant stated in his statement as follows:

> "I have been advised I need not make this statement, and no threats or promises have been made to me. I know it may be used in court."

As to ASSIGNMENT OF ERROR NO. 12, it is appellant's contention the Court erred in sustaining objections of the Government to the attempt by appellant to show the method and means provided by the Field to return tools upon transfer to another position

on the Field. We are at a loss to understand how this evidence would be competent, or material, or relevant in any way whatsoever. The sole issue before the Court was whether or not the appellant had stolen the articles in question from McClellan Field.

As we have pointed before, the appellant had already admitted taking the articles from the Field, had admitted that he knew it was against Federal law to take the articles in question from the Field. Undoubtedly there are rules and regulations by which tools can be transferred from the person to whom they are issued back into the tool room at the Field. However, the appellant has never contended that the evidence he offered would tend to prove that appellant had the right to remove the tools in question in this case from the Field to his home for personal use. Therefore, we submit that the objection was well taken.

In ASSIGNMENT OF ERROR NO. 13 the appellant contends that it was error by the Court to sustain an objection to the introduction of evidence of the demand of McClellan Field against appellant in the sum of $61.24 to cover value of lost tools, which demand appellant received through the mails.

It is to be noted in this regard that the letter the appellant attempted to offer in evidence was dated January 4, 1944, a month and a half after appellant's discharge from McClellan Field. We submit that this letter would have no bearing upon the guilt or innocence of the appellant as to the charge against him in this case, that is, as to whether or not he had stolen

the tools in question from McClellan Field. Assuming, without conceding, that some of the tools in question came into appellant's hands lawfully for use at McClellan Field, the appellant does not prove by this evidence that appellant had the right to remove those tools to his home for his own personal use.

In this Assignment of Error the appellant also states:

> "Apparently the indictment itself was taken as sufficient evidence of the guilt of appellant and no further testimony or evidence was required."

Such a statement is, of course, absurd. The Government introduced testimony by witnesses Chandler and Parker that the property in question was property of the United States Government. Second, the Government actually introduced the physical evidence, to-wit, a number of tools marked "U.S.A.", "U.S.A. Air Corps", etc. Third, the Government showed that appellant had access to this property at McClellan Field. Fourth, the Government showed that the articles in question were found at appellant's home. Fifth, the Government showed that appellant on at least three separate occasions stated that he had taken the articles in question from McClellan Field and that he knew it was against Federal law to do so.

In ASSIGNMENT OF ERROR NO. 14 appellant contends that the Court erred in sustaining objections to introduction in evidence of 12 memorandum receipts. We submit that the Court was correct in its ruling as the receipts would not under any stretch of

the imagination prove, or tend to prove, whether or not the appellant stole the tools in question from McClellan Field.

ASSIGNMENT OF ERROR NO. 15 is practically identical with Assignment of Error No. 14, except that it relates to a voucher issued at McClellan Field to appellant either in December, 1943, or January, 1944, showing payment of $52.92 by appellant for tools. It is obvious that this voucher could have no bearing upon the guilt or innocence of the appellant in this case as the voucher was issued, according to the appellant, in December, 1943, or January, 1944, which was subsequent to the date of the offense charged in the indictment. Further, all that could possibly be shown by the voucher under any circumstances would be that appellant, according to his contention, paid $52.92 to McClellan Field for tools, and there is no contention by the appellant that this payment could be connected in any way with the tools in question in the indictment in this case.

ASSIGNMENT OF ERROR NO. 16—the appellant contends the Court erred in sustaining objection to testimony of the appellant as to a conversation had with a Captain Pierce the day following the date of the statement given by appellant on November 24, 1943 to officers at McClellan Field. It should be noted that any such testimony by the appellant would be a self-serving declaration, as the conversation occurred, according to appellant's contention, the day after appellant gave this statement or confession. It fur-

ther can be noted that appellant did not call Captain Pierce as a witness in his behalf. At any event, it is clear that what was said by the appellant or Captain Pierce the day following the taking of the statement could not in any way tend to show whether or not the statement was obtained by "third-degree methods" as the appellant does not contend that Captain Pierce was present at the time the statement was given.

ASSIGNMENT OF ERROR NO. 17 refers to the Court's ruling in striking out the testimony of appellant regarding being in custody of Mr. Chandler. It should be noted that the Court, of course, allowed the appellant to state all the facts and circumstances surrounding the entire transaction involved in this case and it is clear that when the appellant attempted to testify that he was in custody of Mr. Chandler it was a conclusion and was properly objectionable.

ASSIGNMENT OF ERROR NO. 18 relates to the Court's ruling sustaining the objection to the introduction in evidence pass for tools which were not mentioned in the indictment and could not possibly have any bearing upon the guilt or innocence of the appellant as charged in the indictment. It is, of course, not the Government's position that under certain conditions tools, trucks, airplanes, etc., cannot be removed from McClellan Field. However, it is the contention of the Government in this case that the appellant had no right to remove from McClellan Field the tools mentioned in the indictment in this case, and we have, of course, limited ourselves to that contention, and we submit that the Court was correct

in sustaining the objection of the Government in this case.

ASSIGNMENT OF ERROR NO. 19 is practically identical in substance with Assignment of Error No. 18, and we submit the Court was correct in its ruling in sustaining the objection to the offered testimony of Witness Dudley.

ASSIGNMENTS OF ERROR NOS. 20, 21, 22, 23 and 24 are also identical with Assignments of Error Nos. 18 and 19, and we will not further discuss the matter.

ASSIGNMENT OF ERROR NO. 25 relates to appellant's contention that the Court erred in rejecting the offer of proof of appellant "to show that a foreman issuing tools to workmen would find himself with two of the same kind, as one workman would turn in the bit of a drill and another the shank and be reissued two drills. When the workmen quit or were transferred, the foreman would have two drills, was charged with one, and he could never return the other." We submit the Court did not err in rejecting this offer of proof as it is apparent it could not possibly have any bearing upon the guilt or innocence of the appellant.

ASSIGNMENT OF ERROR NO. 26 alleges that the Court erred in finding the appellant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts of possession. We submit that the evidence was sufficient on which to find the appellant guilty of hav-

We wish also to point out to the Court that appellant did not take an exception to a ruling of the Court during the entire course of the trial. Of course, while it is true that the Court may take notice of plain error in the record, no such plain error has been alleged by the appellant, and we respectfully submit that on this ground alone the Court should affirm the judgment of the Trial Court.

Dated, Sacramento, California,
June 14, 1944.

Respectfully submitted,

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No. 10729

United States
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Transcript of Record

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Rotary Colorprint, 55 Eleventh Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Answer 18

Exhibit A—Proofs of Death 22

Exhibit B—Instructions 23

Exhibit C—Attending Physician's Statement 25

Exhibit D—Modes of Settlement 26

Appeal:

Certificate of Clerk to Transcript of Record on 37

Designation of Additional Parts of Record on 35

Designation of Record on 33

Notice of 30

Order Consolidating Cases for 39

Statement of Points on (CCA) 41

Statement of Points on (DC) 31

Certificate of Clerk to Transcript of Record on Appeal 37

Complaint 2

Exhibit A—Policy of Insurance issued to Arthur Barr 7

Designation of Additional Parts of Record on Appeal (DC) 35

Designation of Record on Appeal (DC) 33

Judgment of Dismissal 28

Minute Order, Nov. 2, 1943—Trial 27

Names and Addresses of Attorneys 1

Notice of Appeal 30

Order Consolidating Appeals for Hearing 39

Order Enlarging Time to File Record and Docket Appeal 36

Order for Removal 16

Petition for Removal 13

Statement of Points on Appeal:

(CCA) 41

(DC) 31

NAMES AND ADDRESSES OF ATTORNEYS

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Standard Oil Building
San Francisco, California,

Attorneys for Defendant and Appellee.

In the Superior Court of the State of California, In and for the City and County of San Francisco

No. 317431

ZEILA BARR,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

COMPLAINT

Now comes the plaintiff above named and for cause of action against the defendant above named alleges:

I

That during all of the times herein mentioned defendant has been and now is a corporation organized and existing under and by virtue of the laws of the State of New York.

II

That on or about the 28th day of June, 1926, defendant above named, in consideration of a premium and for other good and valuable considerations then paid by Arthur Barr, deceased, to defendant, then and there insured the life of said Arthur Barr, deceased, and executed and delivered to said Arthur Barr, deceased, a policy of insurance wherein and whereby said defendant agreed to and did insure the life of said Arthur Barr; that a photostat which is a full, true and correct copy of said policy of in-

surance [2*] is attached hereto marked Exhibit "A", is hereby referred to and is hereby made a part hereof as though the same were set forth herein in full.

III

That in and by said policy of insurance defendant agreed to pay to plaintiff who was then and there the wife of said Arthur Barr, deceased, as beneficiary under the terms of said policy of insurance the sum of Ten Thousand Dollars $10,000) upon the death of said Arthur Barr, deceased, and an additional Ten Thousand Dollars ($10,000) in the event that the death of said Arthur Barr, deceased, resulted from accident upon proof that the death of said Arthur Barr, deceased, resulted solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means.

IV

That said Arthur Barr, deceased, paid all premiums required to be paid by said policy and contract of insurance and duly performed all of the conditions and requirements on his part to be performed by said contract and policy of insurance; that plaintiff duly performed all of the conditions and requirements on her part required to be performed by said contract and policy of insurance;

*Page numbering appearing at foot of page of original certified Transcript of Record.

that ever since said 28th day of June, 1926, said contract and policy of insurance has been and now is in full force and effect.

V

That on or about the 31st day of May, 1942, said Arthur Barr received bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, to-wit, a tick bite, which said injuries directly, exclusively and independently of all other causes resulted in and caused the death of said Arthur Barr on the 6th day of June, 1942. [3]

VI.

That plaintiff above named gave to defendant above named, in writing, the notices and furnished the proof required by said policy of insurance of said accidental death of said Arthur Barr and made demand on defendent for the payment of the total sum of Twenty Thousand Dollars ($20,000) payable as aforesaid under the terms of said contract and policy of insurance; that defendant has paid to plaintiff the sum of Ten Thousand Dollars ($10,000) but has failed, refused and neglected to pay said additional amount of Ten Thousand Dollars ($10,000) as required by said contract and policy of insurance, and no part of said additional sum of Ten Thousand Dollars ($10,000) has been paid plaintiff as required by said contract and policy of insurance or otherwise, and the whole thereof is now due, owing and unpaid.

Wherefore, plaintiff prays judgment against defendant for the sum of Ten Thousand Dollars ($10,000), lawful money of the United States of America, together with interest thereon at the rate of seven percent (7%) per annum from the 6th day of June, 1942, together with costs of suit herein, and for such other relief as to the court may seem meet and just in the premises.

KEITH R. FERGUSON
JOHN J. TAAFFE
Attorneys for Plaintiff.

State of California
City and County of San Francisco—ss.

John J. Taaffe, being duly sworn on behalf of the plaintiff in the above entitled action, says:

That he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that said plaintiff is absent from the City and County of San Francisco, State of California, where her attorney John Taaffe has his office, and that affiant is one of the attorneys for plaintiff and therefore makes this affidavit of verification.

JOHN J. TAAFFE

Subscribed and sworn to before me this 30 day of March, 1943.

[Seal] JACOB S. MEYER
Court Commissioner of the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 31, 1943. H. A. van der Zee, Clerk, by D. E. Dunn, Deputy Clerk.

[Endorsed]: Filed May 8, 1943. U. S. District Court. [4]

THE

Equitable

LIFE ASSURANCE SOCIETY



OF THE UNITED STATES

NUMBER 4,090,887

FACE AMOUNT $10,000

HENRY BALDWIN HYDE FOUNDER. JULY 25 1859

HEREBY INSURES THE LIFE OF

--- ARTHUR BARR ---

(herein called the Insured)

AND AGREES TO PAY AT ITS HOME OFFICE IN THE CITY OF NEW YORK

--- TEN THOUSAND DOLLARS ---

(the face of this policy)

TO

his wife --- ZELLA BARR --- Beneficiary

(with the right to the Insured to change the Beneficiary or assign this policy)

upon receipt of due proof of the death of the Insured, provided premiums have been duly paid and this policy is then in force and is then surrendered properly released; and IN EVENT OF DEATH FROM ACCIDENT THE SOCIETY AGREES TO INCREASE THE AMOUNT SO PAYABLE to --- TWENTY THOUSAND DOLLARS ---, upon due proof that the death of the Insured resulted solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, subject to the terms and conditions contained on the third page hereof. AND FURTHER, IF THE INSURED BECOMES WHOLLY AND PERMANENTLY DISABLED BEFORE AGE 60 the Society will waive subsequent premiums and pay to the Insured a DISABILITY-ANNUITY of --- ONE HUNDRED DOLLARS --- A Month, subject to the terms and conditions contained on the third page hereof.

This insurance is granted in consideration of the payment in advance of Four hundred twenty-seven and 30/100 Dollars and of the payment annually thereafter of a like sum upon each eighteenth day of June until TWENTY full years' premiums shall have been paid, or until the prior death of the Insured. These payments include a n annual premium of $14.00 for the Double Indemnity and of $21.80 for the Total and Permanent Disability provision granted under this contract. Upon any anniversary of this policy said Double Indemnity and Disability provisions may be discontinued by returning this policy to the Society for proper endorsement, with a written request signed by the Insured (or assignee if any) and thereafter the payment of the premiums for such provisions shall not be required.

THE PRIVILEGES and CONDITIONS stated on the subsequent pages hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed.

Executed this twenty-eighth day of June, 19 26, at the Home Office of the Society in New York.

EXAMINED BY

W. Alexander Secretary. H. A. Day President.

5 Asst Secretary. Asst Registrar.

3122. 31, 12. Ins. Acc. & Death. 20 P. L.—P. U.

INSURANCE PAYABLE AT DEATH. DOUBLE INDEMNITY FOR FATAL ACCIDENTS.

TOTAL AND PERMANENT DISABILITY PROVISION: WAIVER OF PREMIUMS—MONTHLY DISABILITY-ANNUITY WITHOUT DEDUCTION OF AMOUNT.

PREMIUMS PAYABLE FOR 20 YEARS OR UNTIL PRIOR DEATH. ANNUAL DIVIDENDS.

PRIVILEGES AND CONDITIONS.

THIS POLICY SHALL BE INCONTESTABLE

after one year from its date of issue, provided premiums have been duly paid, subject to the provisions as to age stated on the third page hereof.

THERE ARE NO RESTRICTIONS

under this policy, while in full force, on travel, residence, occupation, nor on military or naval service, except those relating to Double Indemnity and Disability, on the third page hereof.

ANNUAL DIVIDENDS.

The proportion of divisible surplus accruing upon this policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter such surplus as shall have been apportioned by the Society to this policy shall at the option of the Insured (or assignee if any), be either—

1. Paid in Cash; or, 2. Applied toward the payment of premiums; or, 3. Applied to the purchase of paid-up Additional Insurance (without double indemnity or total and permanent disability benefits); or, 4. Left to accumulate at 3½ interest, compounded annually. If a higher average annual rate is earned, this accumulation may be increased by an interest dividend as determined and apportioned by the Society. Such accumulations will be payable upon the maturity of this policy or on any anniversary of its register date.

Unless the Insured (or assignee if any) shall elect one of the foregoing options within three months after the mailing by the Society of a written notice requiring such election, the dividend shall be applied to the purchase of paid-up Additional Insurance (Option 3). This Additional Insurance may be surrendered by the Insured at any time for the cash value thereof, which shall not be less than the original Cash Dividend.

POST-MORTEM DIVIDEND.

In the event of the death of the Insured after the first policy year, and while this policy is in full force and effect, a cash dividend will be allowed for the fraction if any, of the then current policy year elapsed before such death.

PROVISIONS RELATING TO LOANS AND SURRENDER VALUES.

LOANS. At any time, while this policy is in full force, after three full years' premiums have been paid, the Society will advance to the Insured (or assignee if any), on proper assignment and delivery of this policy, and on the sole security hereof a sum which, with interest, shall not exceed the cash value at the end of the then current policy year (as stated in the opposite Table), less any indebtedness to the Society hereon, provided all premiums or instalments of the same have been fully paid to the end of the then current policy year. Interest shall be at the rate of 6% per annum, and shall be payable on the premium anniversary date of this policy. The loan may be increased by the cash value of dividend additions credited to this policy, if any. If the loan is for a purpose other than to pay premiums on policies in the Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay such loan or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the Insured, and to the assignee of record if any, to their addresses last known to the Society.

OPTIONS ON SURRENDER OR LAPSE. After three full years' premiums have been paid hereon, upon any subsequent default in the payment of any premium or instalment thereof, and within three months after such default, this policy may be surrendered by the Insured (or assignee if any) who may elect one of the following options:

(a) To receive the Cash Surrender Value of this policy; or

(b) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy, but without double indemnity or total and permanent disability benefits; or

(c) To continue the insurance for its face amount (and any outstanding dividend additions) as paid-up extended term insurance for the period shown in the opposite Table, or for such further period, as the dividend additions (if any) will purchase, but without future participation, or right to loans, or double indemnity or total and permanent disability benefits.

In the event of default in the payment of any premium or instalment thereof after this policy has been in force three full years, if the Insured (or assignee if any) does not select one of said options within three months of such default, the insurance shall be continued as provided under Option (c).

If there be any indebtedness against this policy, the cash surrender value shall be reduced thereby, the paid-up insurance shall be reduced proportionately, and the extended term insurance shall be for the face amount of the policy less the indebtedness and for such period as the reduced cash value will purchase.

The Insured's right to change, assign or terminate this policy shall extend to any paid-up insurance accruing hereunder.

BASIS OF COMPUTATION. The RESERVE for which funds are to be held upon this policy shall be computed upon the American Experience Table of Mortality with interest at 3% by the net level premium method.

The values stated in the opposite Table are mathematical equivalents and each is equal to the full RESERVE at the end of then current policy year, on the basis stated in the preceding paragraph, less a surrender charge of not more than 1½% of the face of this policy until the completion of the tenth policy year, at which time and thereafter there is no deduction made as a surrender charge, except that fractions of a month and fractions of a dollar are not allowed.

PAYMENT OF SURRENDER VALUE. The granting of any surrender value under this policy may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor.

TABLE OF LOAN AND SURRENDER VALUES FOR EACH $1,000 OF FACE AMOUNT OF THIS POLICY.

THE TERM FOR WHICH EXTENDED INSURANCE WILL BE GRANTED IS THE SAME WITHOUT REGARD TO THE AMOUNT OF THE POLICY.

After policy has been in force	LOAN & CASH VALUE FOR EACH $1,000 OF FACE AMOUNT OF POLICY. The Loan Value is the Cash Value less Interest to the premium anniversary date.	PAID-UP LIFE INSURANCE FOR EACH $1,000 OF FACE AMOUNT OF POLICY. Without Double Indemnity or Disability Benefits.	PAID-UP EXTENDED TERM INSURANCE. Without Double Indemnity or Disability Benefits.	
			Years.	Months.
2 Years	$ 28	$ 62	3	1
3 "	$ 56	$124	6	3
4 "	$ 81	$178	9	0
5 "	$110	$235	11	9
6 "	$136	$286	13	11
7 "	$166	$342	16	0
8 "	$196	$397	17	9
9 "	$228	$452	19	3
10 "	$261	$507	20	7
11 "	$292	$557	21	7
12 "	$324	$606	22	5
13 "	$357	$655	23	3
14 "	$391	$704	24	0
15 "	$426	$753	24	10
16 "	$462	$802	25	9
17 "	$500	$851	26	9
18 "	$539	$900	28	1
19 "	$579	$950	30	2
20 "	$621	—Policy fully Paid-up—		
21 "	$632			
22 "	$643			
23 "	$655			
24 "	$666			
25 "	$678			
30 "	$734			

The loan obtainable at the end of any given year may be secured during that year, if the premium for the entire year has been paid.

Loan and Surrender values for later years will be on the same basis, and will be furnished on request.

These values are exclusive of dividend additions, and are for completed policy years. Due allowance will be made for any fractional premium paid beyond completed policy years.

If there are any dividend additions to this policy, these values will be increased thereby. They will be reduced, if there is any indebtedness hereon.

L 20

FOR AGE 36

NOTE: The foregoing Loan and Surrender value provisions are hereby extended to become operative after 2 full years' premiums shall have been paid, for amounts as stated above. The Basis of Computation is the same as hereinbefore stated, except that for the surrender value at the end of the second policy year a surrender charge of not more than 2% of the face of this policy is made. S. 840

PRIVILEGES AND CONDITIONS.

SPECIAL PROVISIONS REGARDING DOUBLE INDEMNITY AND TOTAL AND PERMANENT DISABILITY.

DOUBLE INDEMNITY IN CASE OF DEATH FROM ACCIDENT.

The increased amount of insurance as stipulated on the face hereof, in case of accidental death shall be payable upon receipt of due proof that the death of the Insured occurred while this policy was in full force and effect, and resulted solely from bodily injuries, caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, provided that death shall ensue within 90 days from the date of such injuries and shall not be the result of or be caused directly or indirectly by self-destruction, sane or insane, disease or illness of any kind, physical or mental infirmity, any violation of law by the Insured, military or naval service of any kind in time of war or by engaging as a passenger or otherwise in submarine or aeronautic expeditions. The Society, in order to determine whether death occurred within the meaning of this provision, shall, in the absence of legal restrictions, have the right and opportunity to make an autopsy.

TOTAL AND PERMANENT DISABILITY.

(I) DISABILITY BENEFITS before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the Insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits:—

(a) **WAIVE PAYMENT OF ALL PREMIUMS payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent Disability; and**

(b) **PAY TO THE INSURED A MONTHLY DISABILITY-ANNUITY as stated on the face hereof; the first payment to be payable upon receipt of due proof of such Disability and subsequent paymants monthly thereafter during the continuance of such total and permanent Disability.**

(NOTE:—Any Premiums so waived and any Disability-Annuity so paid *shall not be deducted* from any amount payable in any settlement of this policy.)

DISABILITY shall be deemed to be TOTAL when it is of such an extent that the Insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such TOTAL DISABILITY shall be presumed to be PERMANENT when it is present and has existed continuously for not less than three months; and, further, the entire and irrecoverable loss of sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, will of themselves be considered as TOTAL AND PERMANENT DISABILITY within the meaning of this provision.

(II) DISABILITY BENEFIT after age 60.

In case the Insured after attaining age sixty, and while this policy is in full force and effect, becomes totally and permanently disabled as above described, and furnishes due proof thereof, the Society, subject to the conditions above stated, will on each subsequent anniversary date of this policy during the continuance of such disability waive payment of the premium, if any, for the ensuing policy year, whereupon the amount of insurance shall become reduced by the amount of premiums so waived and subsequent premiums and loan and surrender values shall be reduced proportionately.

(III) RECOVERY FROM DISABILITY.

The Society shall have the right at any time or times during the first two years after receipt of such proof of disability, but thereafter not more frequently than once a year, to require proof of the continuance of such total disability. If the Insured shall fail to furnish satisfactory proof thereof, or if it appears at any time that the Insured has become able to engage in any occupation or perform any work for compensation of financial value, no further premiums will be waived and no further Disability-Annuity payments will be made hereunder on account of such disability.

(IV) MILITARY OR NAVAL SERVICE. Disability resulting directly or indirectly from military or naval service in time of war is not a risk assumed by the Society.

BENEFICIARY. If there is no written assignment of this policy in force and on file with the Society:

(a) The Insured may from time to time during its continuance, change the beneficiary or beneficiaries by a written request, upon the Society's blank, filed at its Home Office, but such change shall take effect only upon the endorsement of the same hereon by the Society; or,

(b) the Insured (or assignee if any) may, without the consent of the beneficiary, surrender, assign or pledge this policy and receive, exercise and enjoy every benefit, right and privilege conferred upon the Insured by the terms hereof.

If the executors, administrators or assigns of the Insured be not expressly designated as beneficiary and if there be no other beneficiary living at the death of the Insured, payment will be made to the surviving children of the Insured; or should none survive, then to the Insured's executors, administrators or assigns.

ASSIGNMENTS. No assignment of this policy shall be binding upon the Society unless in writing and until filed at its Home Office. The Society assumes no responsibility for the validity of any assignment.

PAYMENT OF PREMIUMS. All premiums are payable in advance at the Home Office, or to any Agent or Cashier of the Society, upon delivery on or before their due date, of a receipt signed by the President, a Vice-President, Secretary or Treasurer, and countersigned by said Agent or Cashier. This policy is based upon the payment of premiums annually; but premiums may be paid, subject to the Society's written approval, in semi-annual or quarterly instalments at the Society's adopted rates for fractional premiums, provided that in the event of the death of the Insured any unpaid portion of the premium for the then current policy year shall be deducted from the amount payable hereunder.

GRACE. A grace of thirty-one days, subject to an interest charge at the rate of 5% per annum, will be granted for the payment of every premium after the first, during which period the insurance hereunder shall continue in force. If death occur within the days of grace, the premium for the then current policy year or any unpaid instalments thereof shall be deducted from the amount payable hereunder.

Except as herein expressly provided, the payment of any premium or instalment thereof shall not maintain this policy in force beyond the date when the succeeding premium or instalment thereof becomes payable.

REINSTATEMENT. If this policy shall lapse in consequence of the non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Society, and the payment of all overdue premiums, with interest at 5% per annum, and upon the payment with interest or the reinstatement of any indebtedness to the Society secured by this policy.

AGE. If the age of the Insured has been misstated, any amount payable under any of the provisions of this contract, shall be that amount which the premium charged would have purchased at the Society's rates in use at the register date hereof for the Insured's correct age.

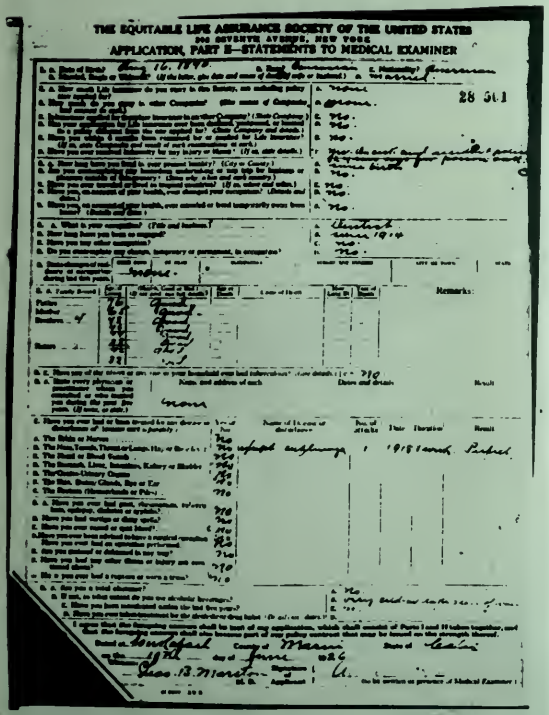
THE CONTRACT. This policy, and the application therefor, a copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim thereunder unless contained in the written application therefor and a copy of such application is endorsed hereon or attached hereto, when issued

Self-destruction, sane or insane, within one year from the date of issue hereof, is a risk not assumed by the Society under this policy. In such an event the Society's liability shall be limited to an amount equal to the premium actually paid.

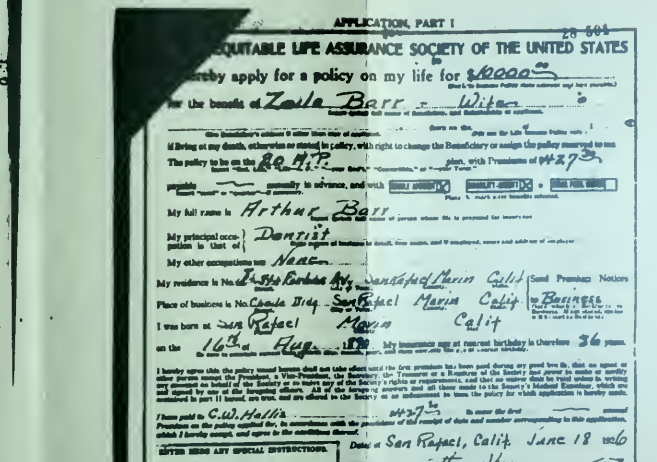
AGENTS are not authorized to modify, or in event of lapse, to reinstate this policy, or to extend the time for payment of any premium or instalment thereof.

THE MODES OF SETTLEMENT available at the maturity of this policy are stated on the fourth page hereof and constitute a part of this contract.

H. A. Day President.



THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES
No. 59 WASTE, AT DEPT., NEW YORK
APPLICATION, PART II—STATEMENTS TO MEDICAL EXAMINER



APPLICATION, PART I

28 501

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

hereby apply for a policy on my life for $10000

for the benefit of Zelle Barr Wife

The policy to be on the 20 H.P. plan, with Premiums of $427

My full name is Arthur Barr

My principal occupation is that of Dentist

My residence is No. 24 Sta Barbara Ave, San Rafael Marin Calif

Place of business is No. Creole Bldg San Rafael Marin Calif

I was born at San Rafael Marin Calif

on the 16th day of Aug 1886 My insurance age at next birthday is therefore 36 years.

I hereby apply that this policy issued hereon shall not take effect until the first premium has been paid during my good health, that no agent or other person except the President, a Vice-President, the Secretary, the Treasurer or a Registrar of the Society has power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or requirements, and that no waiver shall be valid unless in writing and signed by one of the foregoing officers. All of the foregoing answers and all those made to the Society's Medical Examiner, which are contained in part II hereof, are true, and are offered to the Society as an inducement to issue the policy for which application is hereby made.

I have paid to C.W. Hallis $427 in cash the first Premium on the policy applied for, in accordance with the conditions of the receipt of date and number corresponding to this application, which I hereby accept, and agree to the conditions thereof.

ENTER HERE ANY SPECIAL INSTRUCTIONS.

Dated at San Rafael, Calif June 18 1906

SIGNATURE OF APPLICANT Arthur Barr

Agency Wm Clay No. G. 457069

CHANGE OF BENEFICIARY REGISTER.

NOTE—ENTRIES IN THIS REGISTER ARE TO BE MADE ONLY BY THE SOCIETY AT ITS HOME OFFICE IN NEW YORK. NO OTHER ENTRIES WILL BE RECOGNIZED.

DATE ENDORSED | BENEFICIARY. | ENDORSED BY

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. NEW YORK N.Y.

20-Payment Life Policy.

No. 4,090,887 G487069

ARTHUR BARR

FACE AMOUNT $ 10,000

AGE 36

Ann. PREMIUM $ 427.30

Including premium for

Double Ind. $ 14.00 and Disability $ 21.80

Register date: June 18th, 1926

Insurance payable at death.
Double Indemnity for fatal accidents.
Total and Permanent Disability Provision:
Waiver of Premiums—Monthly Disability-Annuity without Deduction at Maturity.
Premiums payable for 20 years or until prior death.—Annual Dividends.

San Francisco

GC

Disb. Ac. & Disab. 20 F. L.—P. V.

SERIES AD 62 Ac3-D5

IT IS NOT NECESSARY TO EMPLOY ANY PERSON, FIRM, OR CORPORATION TO COLLECT THE INSURANCE OR SECURE ANY BENEFIT UNDER THIS POLICY. WRITE DIRECT TO THE SOCIETY, 393 SEVENTH AVENUE, NEW YORK, OR COMMUNICATE WITH THE NEAREST AUTHORIZED AGENT OF THE SOCIETY WHOSE DUTY IT IS TO FACILITATE ALL SETTLEMENTS WITHOUT CHARGE.

FOURTH PAGE.

MODES OF SETTLEMENT AT MATURITY OF POLICY.

The Insured (or the beneficiary after the Insured's death in case the Insured shall have made no election) may, by written notice to the Society at its Home Office, elect to have the net sum due under this policy upon the death of the Insured, either paid in Cash; or,

OPTION 1. Left on deposit with the Society during the lifetime of the beneficiary, to be paid upon the death of the beneficiary, to the beneficiary's legal representatives or assigns. The Society guarantees to pay interest on this deposit during its continuance at the rate of 3%. If a higher average annual rate shall be earned by the Society, the amount may be increased by an interest dividend as determined and apportioned by the Society; or,

OPTION 2. Paid in a fixed number of Annual Instalments as set forth in the following table; or,

OPTION 3. Converted into a fixed Income to the beneficiary for life, consisting of the payment of a fixed amount as shown by the following table, annually for TWENTY years certain, and of the continuation of annual payments of like amount thereafter during the life of the beneficiary, provided that if this option be availed of, the Society will require satisfactory evidence of the age of the payee.

Under Options 2 and 3, the amounts payable are based upon an assumed rate of interest of 3%. If a higher average annual rate shall be earned by the Society, the amount of the instalments under Option 2 and of the first twenty instalments under Option 3 may be increased by an interest dividend as determined and apportioned by the Society.

If one of the foregoing options is elected, this policy must be surrendered upon its maturity and a supplementary contract issued for the purpose of carrying out said option; under Options 2 and 3 the supplementary contract is to be NON-COMMUTABLE, unless the Insured otherwise orders during lifetime by written notice to the Society at its Home Office.

TABLE OF INSTALMENTS FOR EACH $1,000.

OPTION 2. INSTALMENTS CERTAIN.				OPTION 3. LIFE INCOME. (20 YEARS CERTAIN)							
Number of Annual Instalments	Amount of each Instalment	Number of Annual Instalments	Amount of each Instalment	Age of Payee when policy matures	Amount of each Instalment	Age of Payee when policy matures	Amount of each Instalment	Age of Payee when policy matures	Amount of each Instalment	Age of Payee when policy matures	Amount of each Instalment
5	$212.00	25	$55.76	17 or under	$40.00	35, 36	$47.00	47	$54.00	57, 58	$61.00
10	$113.82	30	$49.53	18, 19, 20, 21	$41.00	37, 38	$48.00	48, 49	$55.00	59, 60	$62.00
15	$ 81.33	40	$42.00	22, 23, 24	$42.00	39, 40	$49.00	50	$56.00	61, 62	$63.00
20	$ 65.26	50	$37.73	25, 26, 27	$43.00	41	$50.00	51, 52	$57.00	63	$63.00
				28, 29, 30	$44.00	42, 43	$51.00	53	$58.00	64, 65, 66	$64.00
				31, 32	$45.00	44	$52.00	54, 55	$59.00	67, 68	$64.00
				33, 34	$46.00	45, 46	$53.00	56	$60.00	69 or over	$65.00

[Title of District Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO THE SOUTHERN DIVISION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

To the Honorable, the Superior Court of the State of California in and for the City and County of San Francisco:

Your petitioner, The Equitable Life Assurance Society of the United States, a corporation, respectfully shows to this honorable court:

That it is the defendant in the above entitled suit, that said suit was heretofore brought by plaintiff above named in this court and it is now pending in said court; that summons was issued therein and served with a copy of the complaint upon your petitioner in the City and County of San Francisco, State of California, on March 31, 1943; that the time has not elapsed within which your [11] petitioner is required by the laws of the State of California or the rules of this court to answer or plead to said complaint of plaintiff; that your petitioner is informed and believes and therefore alleges that said plaintiff was at the time of the commencement of this suit and still is a citizen of the United States and of the State of California and a resident of the County of Marin, State of California, in the Southern Division of the District Court of the United States for the Northern District of California; that your peti-

tioner was at the time of the commencement of said suit and still is a citizen and a corporation existing under and by virture of the laws of and a resident of the State of New York and a non-resident of the State of California and qualified to do and doing business within said state as a foreign corporation.

Your petitioner further shows that the suit above entitled is a suit of a civil nature at law between citizens of different states, of which the District Courts of the United States are given jurisdiction, brought by plaintiff for the purpose of recovering from your petitioner the sum of $10,000, which plaintiff claims is owing to her under the provisions of an insurance contract, as more fully appears from the complaint on file in said suit; that your petitioner disputes the said claim of plaintiff and denies the said alleged liability, and that the matter in controversy between said plaintiff and your petitioner exceeds, exclusive of interest and costs, the sum of $3,000.

Your petitioner further shows that it has made and filed herein its bond as good and sufficient surety that it will within thirty (30) days from the date of the filing of this petition enter in the Southern Division of the District Court of the United States for the Northern District of California a certified copy of the record in this suit and [12] for the payment of all costs that may be awarded by said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto; that your petitioner

desires to remove said cause to the Southern Division of the District Court of the United States for the Northern District of California.

Your petitioner therefore prays that this petition and said bond be accepted by this court and that the said suit be removed to said District Court pursuant to the statutes in said cases made and provided, that a transcript of the record herein be made by the clerk and certified to as provided by law, and that this court proceed no further in this suit.

And your petitioner will ever pray.

PILLSBURY, MADISON & SUTRO
NORBERT KORTE
Attorneys for Petitioner [13]

State of California,
City and County of San Francisco—ss.

Curtis G. Smith, being first duly sworn, deposes and says: That he is an officer, to wit, the cashier, of The Equitable Life Assurance Society of the United States, a corporation, the defendant in the above entitled action, and makes this affidavit for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

CURTIS G. SMITH

Subscribed and sworn to before me this 7th day of April, 1943.

(Seal) FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 9, 1943. H. A. van der Zee, Clerk, By H. Brunner, Deputy Clerk.

[Endorsed]: Filed May 8, 1943. . S. District Court. [14]

[Title of District Court and Cause.]

ORDER FOR REMOVAL

It appearing to the satisfaction of this court that The Equitable Life Assurance Society of the United States, a corporation, defendant in the above entitled action, has this day filed its petition for removal of this cause to the Southern Division of the District Court of the United States for the Northern District of California in accordance with the statute therefor provided, and that said defendant has also this day filed its bond on removal, duly conditioned with good and sufficient surety as provided by law, and it appearing that said petition for removal and said bond were so filed before the presentation thereof to this court for acceptance; and it appearing that due and sufficient written notice of said petition and bond for removal has been given [15] to the plaintiff above named prior to the filing of the same; and it appearing that this is a proper cause for removal to said District Court;

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that said petition and bond are hereby accepted and that this cause be and it is hereby removed to the Southern Division of the District Court of the United States for the Northern District of California, and the clerk of this court is hereby directed to make up and certify a copy of the record in said cause for transmission to said District Court forthwith.

Done in open court this 9th day of April, 1943.

THERESA MEIKLE

Judge of said Superior Court

[Endorsed]: Filed April 9, 1943. H. A. van der Zee, Clerk, by H. Brunner, Deputy Clerk.

[Endorsed]: Filed May 8, 1943. [16]

State of California,
City and County of San Francisco—ss.

CERTIFICATE OF CLERK

I, H. A. van der Zee, county clerk of the City and County of San Francisco and ex officio clerk of the State of California in and for the City and County of San Francisco, do hereby certify that the papers attached hereto consisting of:

Complaint;

Demurrer;

Notice of intention to file petition and bond for removal and of presentation to court for acceptance;

Petition for removal of cause to the Southern

Division of the District Court of the United States for the Northern District of California;

Bond on removal; and

Order for removal,

constitute a full, true, and correct copy of the record in the within entitled action now on file in my office.

Dated: May 6th, 1943.

(Seal) H. A. VAN DER ZEE,
County Clerk.
By H. BRUNNER
Deputy

[Endorsed]: Filed May 8, 1943. U. S. District Court. [17]

In the District Court of the United States for the Northern District of California, Southern Division

No. 22613-R

ZEILA BARR,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

ANSWER [18]

Comes now he Equitable Life Assurance Society Of The United States, defendant above named, and

for its answer to plaintiff's complaint on file herein, denies, and avers as follows:

I

Answering the allegations of paragraphs II and III of said complaint, defendant admits that on June 28, 1926, in consideration of a premium paid to it by Arthur Barr and for other good and valuable consideration it executed and delivered to said Arthur Barr a policy of insurance, a true copy of which is attached to the complaint herein, marked "Exhibit A," and denies generally and specifically, each and every, all and singular, the remaining allegations of said paragraphs II and III inconsistent with said allegations hereinabove specifically admitted.

II

Answering the allegations of paragraph IV of said complaint, defendant admits that said Arthur Barr paid all premiums required to be paid under said policy of insurance up to June 18, 1942, and that said policy was in full force from June 28, 1926, to date, and denies generally and specifically, each and every, all and singular, the remaining allegations of said paragraph IV not hereinabove specifically admitted.

III

Answering the allegations of paragraph V of said complaint, defendant admits that said Arthur Barr died on June 6, 1942, avers that it has no knowledge, information, or belief sufficient to enable it to answer the allegations of said paragraph V that on

ATTENTION IS DIRECTED TO THE NOTE AND INSTRUCTIONS ON PAGE 2

PROOFS OF DEATH

CLAIMANT'S STATEMENT

NOTICE IS HEREBY GIVEN TO

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

that Barr, Arthur (Dr.) of (Street) San Rafael (City or Town)

County of Marin and State of California whose life was insured by said Society, under its

Policy No 4090 887 dated June 18th, 1926 for the sum of

Ten thousand and no/100 Dollars has died and in proof of claim under said Policy , the undersigned does answer as follows:

1. Occupation of the deceased (Answer →) Dentist

2. *a.* Date of birth of the deceased — *a.* San Rafael Calif Aug 16. 1890
 b. Exact place of birth — *b.* Aug 16. 1890 (Town) San Rafael Calif (County or Parish) (State)
 c. Parents' names, and mother's maiden name — *c.* WILLIAM BARR - AMELIA LANG
 d. From what source, such as family record, certificate of birth or other record, is the date of birth derived? — *d.* Birth certificate

3. Place and date of death — San Rafael, Calif June 6. 1942

4. How many years had you known the deceased? — I had known the deceased for 26 years

5. State all facts in connection with cause and circumstances of death — On Sunday last starting about noon 27. 1942 Dr Barr had a chill on his face. Came home got a check up June 2. 1942 & Dr. Long thought he had a cold

6. *a.* State the precise duration of the last illness of the deceased — *a.* 2 days - Became ill night of June 3rd 1942
 b. Date he last worked — *b.* Taken to bed & completely June 4. 1942 - Died 8:22 last visited June 3. 1942 June 6. 1942

7. *a.* State your relationship, if any, to the deceased — *a.* Widow
 b. State in what capacity, whether as beneficiary, assignee or otherwise, you claim title to the Insurance — *b.* Beneficiary
 c. State your date of birth — *c.* Oct 4. 1898
 d. State your residence — *d.* FOREST AVE & 1 st San Rafael Calif
 e. State who has the policy and if other than yourself give reasons — *e.* Have Policies in my possession

8. Had the deceased any other life or accident Insurance? If so, state in what companies and for what amounts, and the dates of the respective policies.

Company	Amount of Policy	Date of Issue
Travelers	5000 accident	June 2. 1937
Travelers	10,000 accident	Feb 26. 1942
	10,000 accident	

WILLIAM BARR + ELINOR BARR Wife + Daughter ARE NAMED BENEFICIARIES

9. Unless the policy specifically provides for an income, instalment or interest settlement, state whether cash or optional settlement is preferred. See "Modes of Settlement" on page 4 — Will notify later

10. Names and addresses of all physicians who attended the deceased during his last illness and during five years prior thereto:

Names	Addresses	Dates of Attendance	Disease or Condition
Thomas Hanson	1016 B St San Rafael	June 4. 5. 6. 1942	Entered Stomach & Intestinal Tract
ALFRED ~~Arthur~~ Reed	240 Post St San Francisco	June 2. 3. 1942	Consultation Dr. Hanson
~~Lars~~ H. Bahrs	Fitzhugh Bldg San Francisco	June 2. 1942	Portions checked

Dated at San Rafael, California (Claimant sign here) Zella H. Barr

this 23rd day of June 1942

State of California }
County of Marin }

On this 23rd day of June 1942

personally appeared before me the above named Zella H. Barr (Claimant's Name) who is known to me, and who subscribed the foregoing before me and made oath that the foregoing notice and answers to the questions are true and full, to the best of Her knowledge, recollection and belief.

(Notary sign here) Robert L. Martinelli

NOTARY PUBLIC in and for the County of Marin, State of California

NOTARY SEAL

B. C. 274—40-12

21

EXHIBIT A

EXHIBIT B

NOTE

The issuance of these blanks is not an admission of the existence of any insurance, and is without prejudice to the Society's legal rights in the premises.

INSTRUCTIONS

The Claimant's and Funeral Director's Statements must be sworn to before an officer duly authorized to administer oaths.

If the Policy is payable to the legal representatives of the Insured, the statement must be made by the executor or administrator, a court certificate of whose appointment must be furnished.

If the Policy is payable to a named beneficiary of legal age, or to an assignee, the claimant's statement must be made by such beneficiary or assignee, as the case may be; and the papers must clearly show each and every claimant to be of legal age.

If the Policy is payable to a minor, the claimant's statement must be made by the guardian of the property, a court certificate of whose appointment must be furnished.

When a policy payable to a designated beneficiary, if surviving, has, by the death of such beneficiary, become payable to another beneficiary, proof of the death of the first named beneficiary must be furnished in the form of an affidavit by a person, preferably the claimant, who was well acquainted with such deceased beneficiary and who knows it to be a fact that such beneficiary is dead.

If the Policy is payable to children or any other group of persons whose names are not specifically mentioned in the Policy, an affidavit must be furnished showing the number of children or other persons in the group and their names and dates of birth.

The payment of the claim will be facilitated and expedited by the filing with the Proofs of Death, of the Policy and all original assignments and releases; in fact such documents are required by the Society before the issue of any supplementary contract provided for in the Policy or under the "Modes of Settlement" described on page 4.

The approval of the claim may be further facilitated by furnishing a newspaper obituary article and death notice, and, where possible, a Board of Health certificate of death. When such death certificate is furnished, the Funeral Director's Statement is unnecessary.

The intervention of a third person is not necessary for the collection of the claim, and payment to any person for pretended services in regard thereto is entirely unnecessary. [22]

ATTENDING PHYSICIAN'S STATEMENT

Data may be given separately where space insufficient for complete answer

1. a. Name of the deceased in full? Arthur Barr

b. Residence at time of death? No Baker I Street San Rafael City or Town State California

c. Occupation? Dentist d. Age of the deceased and basis of your knowledge thereof? 51

2. How long had you known the deceased? 15 yrs. When were you first consulted by deceased in last illness? June 4 1942

3. By whom was the deceased referred to you? None

4. Give particulars of each condition for which you treated or advised the deceased prior to last illness with date, duration and result:

Nature of Condition	Date	Duration	Result
None.			

5. Date of death? June 6, 1942 Place of death? Cottage Hospital - San Rafael, Calif

6. a. What was the immediate cause of death? a. acute bronchial pneumonia

b. How long, in your opinion, did the deceased suffer from this disease or impairment? b. two days.

c. What were the contributory causes of death? Give, as nearly as you can by dates, the duration of each.

Disease or Impairment	Duration
None	From ... to ...
	From ... to ...

7. Was an operation or autopsy performed? (specify) Yes By whom? Dr. Berges

What were the findings? Consolidated patches both lungs.

8. Was death due to suicide, homicide or accident? Unknown If due to an accident describe the same fully; if due to suicide or homicide, state the means employed Was bitten by a wood tick about 5/24/42 in mountain area about here reported Rocky Mountain Spotted Fever.

9. Give names and addresses of all other physicians and other practitioners who, to your knowledge, attended the deceased during the past three years.

Name	Address	Disease or Impairment
Dr. Leroy H. Briggs	San Francisco Calif	Physical examination
Dr. Wilfrid C. Reed	San Francisco Calif	Pneumonia

10. Did you see the body of the deceased, and was it that of the person described in your answer to No. 1 above? Yes

11. From what medical school and in what year did you graduate? Stanford Medical School - 1927

I hereby certify that the foregoing answers are true and full to the best of my knowledge, recollection and belief.

Date June 26, 1942 Signature Homer C Marston M.D.

Address 1010 B Street San Rafael City or Town Calif. State

FUNERAL DIRECTOR'S STATEMENT

NOTE—THIS IS NOT REQUIRED WHEN OFFICIAL CERTIFICATE OF DEATH IS FURNISHED

1. Name of the deceased in full? Arthur Barr

2. Residence: No. 477 Street Foster City or Town San Rafael State Calif

3. Deceased was Interred at Tamalpais Vale Cemetery on (Interred or Cremated) (Name of Place and Location) (Date)

4. Did you see the body of the said deceased, and do you know beyond a doubt that it was the body of the person described in the accompanying statement of the claimant? Yes

5. Date of birth of the deceased. (This date should be ascertained, if possible, from the family record.) August 16 1887

Dated at San Rafael this 27th day of June 1942

Funeral Director's Signature Lisa Galen

State of Calif. }
County of Marin } On this 27th day of June 1942 personally appeared before me the above named Lisa Galen (Funeral Director's Name) who is known to me, and who subscribed the foregoing before me and made oath that the answers to the foregoing questions are true and full to the best of his knowledge, recollection and belief.

(Notary sign here) Audrey Elizabeth Kesk

NOTARY PUBLIC in and for the County of Marin, State of California.

—23

EXHIBIT C

64 Classification

THIS PANEL IS FOR HOME OFFICE USE ONLY

PROOFS OF DEATH

Name of the Deceased

Date of Death 42-6-6

Cause of Death

Proofs Received 42-8-8

9-18

Policy No.

Approved for

By

MODES OF SETTLEMENT

If the Policy specifically provides for the payment of the policy proceeds in a single sum, and if the Mode of Settlement Options are contained in the Policy, the beneficiary may elect to have payment made in accordance with any of the following optional methods: (If the policy does not contain any provision for Modes of Settlement, such options may be available under the present rules of the Society. Information in this connection may be secured by writing to the Agency from which this Proof of Death Form was received or to the Department of Policy Claims at the Home Office. When writing, please refer to the Policy number and the name of the deceased.)

DEPOSIT OPTION:	Left on deposit with the Society at interest guaranteed at the rate provided for in the Policy, with such Excess Interest Dividend as may be apportioned. Interest may be paid annually, semi-annually, quarterly or monthly.
INSTALMENT OPTION: FIXED PERIOD OF YEARS.	Paid in a fixed number of equal annual, semi-annual, quarterly or monthly instalments. Funds held under this option shall participate in Excess Interest Dividends as determined and apportioned by the Society.
LIFE INCOME OPTION:	Paid in equal annual, semi-annual, quarterly or monthly instalments for ten or twenty years certain (or any shorter certain period provided for in the policy) as may be elected and continuing during the remaining lifetime of the beneficiary. Under this option the income during the certain period elected shall be increased by Excess Interest Dividends as determined and apportioned by the Society. (If this option is elected the Society will require satisfactory evidence of the age of the beneficiary.)
INSTALMENT OPTION: FIXED AMOUNT.	Left with the Society as a fund to be credited anually with interest at the rate of 3% per annum on the unpaid balance and with such Excess Interest Dividend as may be apportioned, and from such funds shall be paid, until the fund is exhausted, periodic instalments of such amounts as may be agreed upon, the final instalment to be the balance then remaining with the Society.

For amounts and further details of the above optinns please refer to the Modes of Settlement contained in the Policy.

NOTE: The foregoing Modes of Settlement may not be elected if the amount to be applied shall be less than $1,000.

24 The options shall be available only if there is a personal beneficiary, i.e., other than an assignee, a corporatinn, partnership, association, trustee, executor, administrator or other fiduciary, etc.

25 EXHIBIT D

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 2nd day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, D. J.

No. 22613-G
No. 22609-G—CIVIL

WILLIAM H. BARR, ETC., ET AL.

vs.

THE TRAVELERS INSURANCE COMPANY

This case came on this day for trial before the Court sitting without a jury. John J. Taaffe, Esq., appeared as attorney for plaintiffs, and Leo R. Friedman, Esq., appeared as attorney for defendant. The attorneys having orally stipulated thereto in open Court, it is Ordered that this case be and the same is hereby consolidated for trial with case No. 22613-R, Zeila Barr vs. The Equitable Life Assurance Society of the United States. Thereupon the two cases proceeded to trial. Mr. Taaffe made a statement to the Court on behalf of the plaintiffs. Mr. Mackey made a motion for judgment in favor of the defendant The Equitable Life Assurance Society of the United States, which said motion was ordered denied. Mr. Friedman made a motion for judgment in favor of the defendant The Travelers

Insurance Company, which said motion was ordered denied. Louis Nave, Le Roy H. Briggs, M.D., Malcolm H. Merrill, M.D., Monroe D. Eaton, M.D., and Karl F. Meyer, M.D., were sworn and testified on behalf of the plaintiffs. Mr. Friedman introduced in evidence and filed Defendants' Exhibit A. Ordered that the further trial of these cases be continued until November 3, 1943, at 10:00 o'clock A.M.

Minute Ordered Nov. 2, 1943. [26]

In the District Court of the United States for the Northern District of California, Southern Division

No. 22613-R

ZEILA BARR,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

JUDGMENT OF DISMISSAL

The above entitled action, (after being consolidated for trial with William H. Barr, a minor, and Agnes O. Barr, a minor, by Zeila H. Barr, their guardian, v. The Travelers' Insurance Company, No. 22609-G, in the records of the above entitled court,) came on regularly for trial on November 2, 3, and 4, 1943, before the above entitled court, sitting without a jury, a jury having been expressly waived, John Taaffe, Esq., appearing for plaintiff, and Messrs.

Pillsbury, [27] Madison & Sutro by William MacKay, Esq., and Harlow P. Rothert, Esq., appearing for defendant; and all evidence on behalf of plaintiff having been introduced and the plaintiff having rested her case, defendant thereupon moved for dismissal of said action under Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States on the ground that upon the facts and the law the plaintiff had shown no right to relief, plaintiff having objected to said motion and said motion having been argued by the attorney for plaintiff and the attorneys for defendant, and the same having been submitted to the court for decision and the court having found that the said motion is meritorious and that upon the facts and the law plaintiff has shown no right to relief.

It is hereby Ordered, Adjudged and Decreed that the plaintiff take nothing in the above entitled action, that defendant recover from plaintiff its costs of suit, and that said action be and the same is hereby dismissed.

Dated: November 10th, 1943.

LOUIS E. GOODMAN
United States District Judge

Approved as to form as provided in Rule 22.

KEITH R. FERGUSON
JOHN J. TAAFFE
Attorneys for Plaintiff

[Enlarged]: Filed Nov 10, 1943. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Zeila Barr, the plaintiff in the above entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment and Order of Dismissal heretofore, to-wit, on the 10th day of November, 1943, given, made and entered in and by the District Court of the United States for the Northern District of California, Southern Division, in the above entitled action, and from the whole of said judgment, which said Judgment is in the words and figures following, to-wit:

"The above entitled action, (after being consolidated for trial with William H. Barr, a minor, and Agnes O. Barr, a minor, by Zeila H. Barr, their guardian, v. The Travelers' Insurance Company, [29] No. 22609-G, in the records of the above entitled court,) came on regularly for trial on November 2, 3, and 4, 1943, before the above entitled court, sitting without a jury, a jury having been expressly waived, John Taaffe, Esq., appearing for plaintiff, and Messrs. Pillsbury, Madison & Sutro by William MacKay, Esq., and Harlow F. Rothert, Esq., appearing for defendant; and all evidence on behalf of plaintiff having been introduced and the plaintiff having rested her case, defendant thereupon moved for dismissal of said action under Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States on the ground that upon the facts and the law the plaintiff had shown

no right to relief, plaintiff having objected to said motion and said motion having been argued by the attorney for plaintiff and the attorneys for defendant, and the same having been submitted to the court for decision and the court having found that the said motion is meritorious and that upon the facts and the law plaintiff has shown no right to relief.

"It is hereby Ordered, Adjudged and Decreed that the plaintiff take nothing in the above entitled action, that defendant recover from plaintiff its costs of suit, and that said action be and the same is hereby dismissed.

"Dated: November 10, 1943.

LOUIS E. GOODMAN
United States District Judge"

Dated: January 31, 1944.

KEITH R. FERGUSON
JOHN J. TAAFFE
Attorney for Plaintiff

[Endorsed]: Filed Jan. 31, 1944. [30]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Now comes the above named plaintiff, and, pursuant to the provisions of Subdivision D of Rule 75 of the Federal Rules of Civil Procedure, files

this, her Designation of the Points on which she intends to rely on her Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit Court.

1. That the said District Court erred in granting the motion of defendant for dismissal of said action under Rule 41B of the Rules of Civil Procedure for the District Courts of the United States.

2. That the said District Court erred in ruling that upon the facts and the law plaintiffs had shown no right to relief.

3. That the said District Court erred in finding that the [31] said motion was meritorious and that upon the facts and the law plaintiff had shown no right to relief.

4. That the evidence introduced and received upon the trial of said cause established prima facie the right of plaintiff to judgment as prayed for in her complaint on file herein, all of which from the reporter's transcript of the testimony and proceedings at the trial on file herin fully and at large appears.

Dated this 31st day of January, 1944.

JOHN J. TAAFFE
KEITH R. FERGUSON
Attorneys for Plaintiff and Appellant.

Receipt of a copy of the foregoing Statement of Points is hereby acknowledged this 1st day of February, 1944.

PILLSBURY, MADISON & SUTRO
NORBERT KORTE
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Feb. 2, 1944. [32]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the above named plaintiff, and, pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure files this, her Designation of the portions of the Record, Proceedings and Evidence to be contained in the Record on her Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The caption.
2. The names and addresses of counsel.
3. The complaint.
4. The order of removal of the cause from the Superior Court of the State of California, in and for the City and County of San Francisco, to the United States District Court for the [33] Northern District of California, Southern Division.
5. The answer of defendant.

6. The order consolidating the action for trial with the action entitled "William H. Barr, a minor, and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, vs. The Travelers Insurance Company", No. 22609 G.

7. The judgment of dismissal.

8. The notice of appeal.

9. The designation of contents of record on appeal.

10. Statement of points on which appellant intends to rely on the appeal.

Dated this 31st day of January, 1944.

JOHN J. TAAFFE
KEITH R. FERGUSON
Attorneys for Plaintiff and Appellant

Receipt of a copy of the within Designation of Contents of Record on Appeal acknowledged this 1st day of February, 1944.

PILLSBURY, MADISON & SUTRO
NORBERT KORTE
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Feb. 2, 1944. [34]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF RECORD DEEMED MATERIAL BY DEFENDANT

Comes now The Equitable Life Assurance Society of the United States, the defendant above named, and hereby designates, pursuant to Rule 75 of the Federal Rules of Civil Procedure, the following additional parts of the record in the above entitled cause to be contained in the record on plaintiff's appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

1. This defendant's petition for removal of cause to the Southern Division of the District Court of the United States for the Northern District of California, with certificate of County Clerk attached.

2. This designation.

Dated: San Francisco, California, February 10, 1944.

PILLSBURY, MADISON & SUTRO
NORBERT KORTE
Attorneys for The Equitable Life Assurance Society of the United States

Receipt of a copy of the foregoing designation of additional parts of record deemed material by defendant acknowledged this 10th day of February, 1944.

KEITH R. FERGUSON
JOHN J. TAAFFE
Attorneys for Zeila Barr,
Plaintiff

[Endorsed]: Filed Feb. 10, 1944. [35]

[Title of District Court and Cause.]

ORDER ENLARGING TIME TO FILE RECORD AND DOCKET CASE

Good cause appearing therefor,

It Is Hereby Ordered that the plaintiff in the above entitled action, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Order of Dismissal heretofore given and made in this cause in and by this Court, may have and she is hereby granted to and including the 8th day of April, 1944, in which to file the Record on Appeal and docket the case in the said Circuit Court of Appeals.

Dated: March 3, 1944.

LOUIS E. GOODMAN
Judge, United States District Court.

[Endorsed]: Filed Mar. 3, 1944. [36]

District Court of the United States, Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 36 pages, numbered 1 to 36, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Zeila Barr, Plaintiff, v. The Equitable Life Assurance Society of the United States, Defendant, No. 22613-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six-dollars and fifteen-cents ($6.15) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of April, A. D. 1944.

[Seal] C. W. CALBREATH
Clerk
WM. J. CROSBY
Deputy Clerk

[Endorsed]: No. 10729. United States Circuit Court of Appeals for the Ninth Circuit. Zeila Barr, Appellant, vs. The Equitable Life Assurance Society of the United States, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 7, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In The United States Circuit Court Of Appeals
For The Ninth Circuit

No. 10728

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by ZEILA H. BARR, their guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,

Appellee.

ZEILA BARR,

Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellee.

ORDER CONSOLIDATING APPEALS FOR HEARING

The causes entitled as above having been consolidated for trial in the District Court, and the same evidence and proceedings in said District Court having been introduced upon the one trial as to both causes, and the questions presented by each of said appeals being the same and there being no necessity for printing the said evidence in separate transcripts; and counsel for the respective parties having stipulated thereto; it is therefore

Ordered that said appeals be consolidated for hearing in one transcript consisting of the pleadings and judgment roll in each of said actions, together with the several notices of appeal and the several designations of the portion of the record to be used on said appeal, and the several statements of the points relied upon by the appellants on said appeal with a single transcript of the testimony and proceedings taken and had in the said District Court on the trial of said consolidated actions.

Dated this 11th day of February, 1944.

CURTIS D. WILBUR
United States Circuit Judge

The foregoing Order is hereby consented to.

JOHN J. TAAFFE
KEITH R. FERGUSON
Attorneys for Appellants.

JOS. T. O'CONNOR
LEO R. FRIEDMAN
Attorneys for Appellee, The Travelers Insurance Company.

PILLSBURY, MADISON & SUTRO
NORBERT KORTE
Attorneys for Appellee, The Equitable Life Assurance Society of the United States

[Endorsed]: Filed Feb. 11, 1944. Paul P. O'Brien, Clerk.

[Endorsed]: Re-Filed Apr. 7, 1944. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10729

ZEILA BARR,

Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellee.

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Now comes the above named appellant and pursuant to the provisions of Section 6 of Rule 19 of this Court files this, her Statement of the Points on which she intends to rely on the appeal and designates herewith the parts of the record which she thinks necessary for the consideration thereof. In this behalf the said appellant hereby adopts her Statement of Points on which Appellant Intends to Rely on Appeal filed in the District Court of the United States for the Northern District of California, Southern Division, the Court from which this appeal is taken, which said statement is a part of the Record on Appeal in the above entitled cause; and appellant hereby designates all of the said Record on Appeal as necessary for the consideration of this appeal.

Dated, this 8th day of April, 1944.

KEITH R. FERGUSON
JOHN J. TAAFFE
Attorneys for Appellant

Receipt of a copy of the within Statement is hereby acknowledged this 8th day of April, 1944.

PILLSBURY, MADISON & SUTRO
Attorneys for Appellee

[Endorsed]: Filed April 8, 1944. Paul P. O'Brien, Clerk.

No. 10,729

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEILA BARR,

Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

FELIX T. SMITH,
FRANCIS R. KIRKHAM,
WILLIAM H. MACKAY,
Standard Oil Building, San Francisco 4,
Attorneys for Appellee.

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CLERK

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Table of Contents

	Page
Jurisdictional Statement	1
Statement of the Case	2
Summary of the Argument	5
Argument	5
1. The judgment was on the merits and correct	5
2. There was no substantial evidence to support plaintiff's case	7

Table of Authorities Cited

Cases

	Pages
Brown v. Beck, 63 Cal. App. 686	6
Erie R. Co. v. Tompkins, 304 U. S. 64	6
Hawkins v. Barney, 5 Pet. 457, 464	6
Meredith v. Winter Haven, 320 U. S. 228	6
Miller v. Director General of Railroads, 270 Pa. 330	6
Swift v. Tyson, 16 Pet. 1	6
Young v. United States, 111 F. (2d) 823, 825	5

Statutes and Codes

Judicial Code:	
Section 24	1
Section 28	1
Section 128	1
United States Code, Title 28:	
Section 41, subdivision 1	1
Section 71	1
Section 225	1

Court Rules

Federal Rules of Civil Procedure:	
Rule 41 (b)	4, 5
Rule 81 (c)	5

No. 10,729

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEILA BARR,

Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an action at law,[1] between a citizen of California and a citizen of New York.[2] The matter in controversy exceeds $3,000.[3] It was filed in the state court,[4] and removed to the District Court.[5] The District Court had jurisdiction.[6] This Court has jurisdiction on appeal.[7]

[1]R. 2.
[2]R. 13-14.
[3]R. 5.
[4]R. 6.
[5]R. 13.
[6]Judicial Code, section 24; U. S. Code, Title 28, section 41, subdivision 1; Judicial Code, section 28; U. S. Code, Title 28, section 71.
[7]Judicial Code, section 128; U. S. Code, Title 28, section 225.

STATEMENT OF THE CASE.

Plaintiff seeks to recover as beneficiary under a life insurance policy[8] the increased amount, payment for which is there provided on death from accident. Dr. Barr, the insured, died of "acute bronchial pneumonia,"[9] "virus pneumonia,"[10] "an atypical type of pneumonia."[11] Plaintiff claims this pneumonia resulted from "Rickettsia bodies" in the lungs,[12] introduced into Dr. Barr's body by a bite[13] of a tick, "Dermacentor andersoni."[14] Plaintiff's effort was to show that Dr. Barr had "Rocky Mountain spotted fever."[15] Plaintiff produced seven experts. Dr. Moody represented plaintiff at the autopsy.[16] He thought the history of the tick's bite had no connection with the virus pneumonia.[17] Dr. Merrill tested a sample of Dr. Barr's blood, at the request of plaintiff's doctor,[18] looking for plague, tularemia and Rocky Mountain spotted fever.[19] All tests were negative.[20] Dr. Eaton worked on the same sample[21] and some tissue sections. He found no Rickettsia.[22] He declined to say he would associate the tick bite with the death, saying "There haven't been any cases of Rocky Mountain spotted fever that died in two

[8]R. 7.
[9]Proof of Death, Attending Physician's Statement, R. 25.
[10]Dr. Eaton, T. R. 135 (The reference is to Reporter's Transcript in No. 10,728.)
[11]Dr. Moody, T. R. 174.
[12]Opening Statement, T. R. 41.
[13]Opening Statement, T. R. 37.
[14]Opening Statement, T. R. 40.
[15]T. R. 217, 218, 220-221.
[16]T. R. 164.
[17]T. R. 190.
[18]T. R. 105.
[19]T. R. 109.
[20]T. R. 110.
[21]T. R. 134.
[22]T. R. 135.

or three days with a pneumonia of this type.''[23] Dr. Meyer examined sections of the lung.[24] He could not say they showed Rickettsia.[25] Dr. Briggs examined Dr. Barr June 2nd,[26] two days after the alleged tick bite. He found no tick bite.[27] Professor Herms was called to identify a tick plaintiff had sent him. He had no recollection.[28] Dr. Marston alone tried to support plaintiff's theory. We discuss his testimony in detail hereafter.[29] Other experts had worked for plaintiff on the case, but were not called. One of them was Dr. Reed, who attended Dr. Barr June 5th, the day before he died.[30] What must have been his views are reflected by the contemporary view of Dr. Marston, his associate, ''I did not know the exact cause of death outside of the bronchial pneumonia.''[31] Dr. Fogarty examined X-rays of Dr. Barr's chest.[32] His conclusion was ''widespread pneumonia of the influenzal type.'' Dr. Berger performed the autopsy for plaintiff.[33] His findings were ''Consolidated patches both lungs.''[34] He says nothing of Rocky Mountain spotted fever, nothing of Rickettsia, nothing of a tick bite, nothing of Dermacentor andersoni. The tick that is supposed to have bitten Dr. Barr cannot be identified. Even Nave claims to have

[23]T. R. 139.
[24]T. R. 151.
[25]T. R. 156.
[26]T. R. 63.
[27]T. R. 65, 74-75.
[28]T. R. 206.
[29]Infra, pp. 7-10.
[30]Proof of Death, R. 22.
[31]T. R. 215.
[32]T. R. 213.
[33]T. R. 163.
[34]Proof of Loss, Attending Physician's Statement, R. 25.

seen "just his back end."[35] Nave describes other ticks.[36] If the description of Dermacentor andersoni is within the judicial knowledge of the Court, then the Court knows that Nave's descriptions do not fit it. On the other hand, if the Court does not know judicially the characteristics of this species, plaintiff's proof simply fails. Plaintiff's brief asserts "The tick was of the species known as the Dermacentor andersoni."[37] Plaintiff refers to no evidence supporting this assertion. There is none. The evidence does not identify any tick as Dermacentor andersoni. Plaintiff's assertion is astutely ambiguous. Grammatically it refers to the tick mentioned in plaintiff's preceding paragraph ultimately supposed to have reached Professor Herms.[38] The professor had no recollection and did not identify the tick. In any event, the point in this case is not the identification of the tick supposed to have been sent Professor Herms, but that of the tick supposed to have bitten Dr. Barr. Whatever the scientific name may be of the guilty tick, of course there was no evidence that that particular tick was infected.

When plaintiff rested, the Court dismissed the action.[39]

Plaintiff appeals.

[35]T. R. 83.
[36]T. R. 80, 95, 98, 100-101, Pl. Ex. A.
[37]Op. Br., p. 15.
[38]Supra, p. 3.
[39]Rule of Civil Procedure 41 (b).

SUMMARY OF THE ARGUMENT.

1. The dismissal was on the merits.[40] Testimony of plaintiff's own witnesses amply supports the judgment for defendant.

2. For the moment granting plaintiff's contention that the dismissal was in the nature of a nonsuit, that disposition of the case was proper. There was no substantial evidence to support plaintiff's claim. Properly analyzed, the testimony of Dr. Marston affords no substantial support.

ARGUMENT.

1. THE JUDGMENT WAS ON THE MERITS AND CORRECT.

It is settled that a judgment under Rule 41 (b) is to be affirmed on conflicting evidence, so long as there is substantial evidence to support the judgment.[41] The only possible distinction between the *Young* case and the case at bar is that the *Young* case was filed in the District Court, while the case at bar was filed in the state court and removed to the District Court. The distinction is unsubstantial. The Rules of Civil Procedure apply equally to actions at law removed to the District Court.[42]

As we have seen,[43] the evidence in this case, from plaintiff's own witnesses, is ample to support the judgment. Plaintiff relies exclusively on one expert, Dr.

[40]Rule of Civil Procedure 41 (b);
Young v. United States, 111 F.(2d) 823, 825.
[41]*Young v. United States,* 111 F. (2d) 823, 825.
[42]Rule 81 (e).
[43]Supra, pp 2-4.

Marston.[44] Five of plaintiff's experts testified unfavorably to plaintiff's contentions. Three experts employed by plaintiff and not produced are disclosed to have had opinions opposed to plaintiff's contentions. Plaintiff's own brief does not claim that there was not sufficient evidence against plaintiff's contentions. It claims merely that Dr. Marston's testimony was a scintilla of evidence in favor of plaintiff, and urges the erroneous legal proposition that dismissal was, therefore, improper.

Plaintiff cites three decisions of the Supreme Court of the United States[45] as holding that federal courts follow state law. These authorities, and the opposing one appellant also cites,[46] all deal with questions of substantive right as opposed to matters of procedure. Since the enactment of the Rules of Civil Procedure under the Act of Congress authorizing them, there has been no question about their efficacy to govern procedure of the District Court in the matters that they cover. The Federal cases cited by plaintiff[47] have no bearing on the point. The two state cases cited[48] deal with no question either of federal procedure or the applicability of state law to federal procedure. The numerous California cases cited[49] purport to deal only with motions for nonsuit. No nonsuit

[44]Infra, pp. 7-10.

[45]*Erie R. Co. v. Tompkins,* 304 U.S. 64; Appellant's Brief. p. 34; *Meredith v. Winter Haven,* 320 U.S. 228; Appellant's Brief, p. 34;
Hawkins v. Barney, 5 Pet. 457, 464; Appellant's Brief, p. 35.

[46]*Swift v. Tyson,* 16 Pet. 1.

[47]Supra.

[48]*Brown v. Beck,* 63 Cal. App. 686; Appellant's Brief p. 34; *Miller v. Director General of Railroads,* 270 Pa. 330; Appellant's Brief, p. 34.

[49]Appellant's Brief, pp. 35-40.

was granted in the instant case. No motion for nonsuit was made in the instant case. The citations are inapplicable.

2. THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT PLAINTIFF'S CASE.

Essentially plaintiff's argument is based upon two passages in the testimony of Dr. Marston. They are printed in blackfaced type in plaintiff's abstract, "I felt that it was most likely due to tick bite;"[50] "All of the symptoms * * * indicative of Rocky Mountain spotted fever."[51] Other portions of the record require such qualification of this testimony as to destroy its effect.

On cross-examination Dr. Marston himself qualified his theory. Asked whether he would alter his diagnosis if Dr. Barr's body showed no "proliferations of the endothelium," he thought that bore some weight, and certainly would have an effect, adding "if it is a proven fact that you always find this proliferation in Rocky Mountain spotted fever, that is, in the terminal blood vessels, and if there were none there, why, of course, it would alter my opinion."[52] Plaintiff's own expert explained the affinity of Rickettsia for these blood vessels,[53] causing first proliferation and subsequently destruction of the cells, blood clots, clogging of the blood vessels and escape of blood.[54] The latter is a partial explanation of the

[50]T. R. 216; Appellant's Brief p. 13.
[51]T. R. 220; Appellant's Brief p. 14.
[52]T. R. 232-233.
[53]Dr. Moody, T. R. 186-187.
[54]Dr. Moody, T. R. 187.

"petechial"[55] spots, characteristic of the disease, from which it takes its popular name. Dr. Moody could not find this condition in Dr. Barr's arteries. He "did not have the blood vessel condition that is common to Rocky Mountain spotted fever."[56] Dr. Eaton concurred.[57] If Dr. Marston had known what these experts knew, then, as he said, "it would alter my opinion."[58]

The opinion Dr. Marston expressed at the trial was not the one he held during the illness and on which he acted then. Dr. Marston did not treat Dr. Barr for Rocky Mountain spotted fever. He says he made a report to the Board of Health "before Dr. Barr's death,"[59] that "I did not know the exact cause of death outside of bronchial pneumonia."[60] June 26, 1942, even three weeks after the death, Dr. Marston certified the Attending Physician's Statement.[61] The answer to question 6 (a) gives "acute bronchial pneumonia" as the cause of death. The answer to question 6 (c) says no disease or impairment was a contributory cause. Question 8 asks whether death was due to accident. The answer is "Unknown." A later portion of the same question is answered "was bitten by a wood tick about 5/31/42 in an area that has reported Rocky Mountain spotted fever." On June 26th, then, the best of Dr. Marston's knowledge, recollection and belief did not permit him to say that the tick bite caused the disease or that Dr. Barr had Rocky Mountain spotted

[55]T. R. 188.
[56]T. R. 188.
[57]T. R. 144.
[58]T. R. 233.
[59]T. R. 214.
[60]T. R. 215.
[61]R. 25.

fever. July 3, 1942, Dr. Marston signed the Death Certificate.[62] In this instrument Dr. Marston gave "acute bronchial pneumonia" as the cause of death. Question 23 of this form specifically directs that "If death was due to external causes fill in the following." Dr. Marston did not fill in the following. During the illness and for a month afterwards Dr. Marston did not believe in the theory to which he testified at the trial.[63]

Dr. Marston never had any experience with Rocky Mountain spotted fever. What he says about it is based solely on reading[64] since Dr. Barr's death[65] eight or ten articles.[66] When he expressed his opinion he had not seen the pathologist's report.[67] "I am not too clear on that; I am not an expert on pathology."[68] Dr. Marston thus disqualified his opinion as evidence.

During the disease Dr. Marston examined Dr. Barr for "petechial" spots and found none.[69] These are "the only helpful clinical manifestations"[70] of Rocky Mountain spotted fever. In Rocky Mountain spotted fever the white blood count runs between 8,000 and 12,000 higher. Dr. Barr had only 2,800.[71] In Rocky Mountain spotted fever "the spleen, as a rule, is enlarged and tender * * * and palpable."[72] Dr. Marston could not palpate the spleen of Dr.

[62]Def. Ex. B. Since it is unprinted in the record, we append a printed copy.
[63]T. R. 223-224.
[64]T. R. 221, 222, 224.
[65]T. R. 224.
[66]T. R. 238.
[67]T. R. 230.
[68]T. R. 231.
[69]T. R. 220.
[70]T. R. 235.
[71]T. R. 236.
[72]T. R. 236.

Barr.[73] At the autopsy he noted that the spleen was not enlarged.[74] These circumstances enforced Dr. Marston's contemporary opinion that Dr. Barr died of pneumonia, rather than of Rocky Mountain spotted fever. Dr. Marston's subsequent desire to change his opinion requires him to disregard these recognized tests of the disease.

The symptoms given by Dr. Marston upon which he based his conclusion that Dr. Barr had Rocky Mountain spotted fever, are "the abruptness of the onset, the mental confusion, nervousness, extreme pains, incubation period of approximately three or four days";[75] "markedly confused, restless, dehydrated, extreme pain all over his body."[76] Upon cross-examination Dr. Marston made it clear that the course of the disease and its manifestations were those to be found in any influenzal pneumonia, any serious, sudden fever.[77] In all, Dr. Barr's case presented some features inconsistent with Rocky Mountain spotted fever,[78] and some consistent with Rocky Mountain spotted fever, but equally consistent with the diagnosis of Dr. Barr's case made by plaintiff's seven other experts, "acute bronchial pneumonia." At the time, Dr. Marston concurred with the others. At the trial he advanced his new theory of Rocky Mountain spotted fever, without any knowledge of that disease.[79] When additional circumstances of the case were called to his attention, he said simply that that would alter his opinion.[80]

[73]T. R. 236.
[74]T. R. 236.
[75]Op. Br., p. 13; T. R. 216.
[76]Op. Br., p. 14; T. R. 220.
[77]T. R. 223.
[78]Supra, pp. 9-10.
[79]Supra, p. 9.
[80]Supra, p. 8.

Such testimony affords not even a scintilla, certainly not substantial evidence, in support of plaintiff's theory.

This appeal presents primarily questions of fact. Only one principle of law is involved, that of the *Young* case.[81] Plaintiff does not cite the decision, does not discuss the principle involved. Under that decision the District Court simply had to find as a fact whether Dr. Barr died from an accident. It accepted the testimony of the majority of plaintiff's experts, and found this factual issue against plaintiff.

On the other hand, if the *Young* case is to be rejected and the District Court's ruling to be assimilated to a nonsuit, the factual question is whether, taking it all together, Dr. Marston's testimony presented the positive opinion of a qualified expert in support of the theory of accidental death. We have shown that Dr. Marston's testimony does not come up to this requirement. As the Court said:

> "Doctor Marston, the witness who offered the strongest grounds on your behalf, if they exist, admitted an unfamiliarity with the thing, but that from what he read, if the man had been bitten by a tick, it was likely that that was the cause of death. But I can't see my way clear to say that that is a sufficient showing of the necessary facts."[82]
>
> "* * * I am convinced that there isn't any evidence at all that sustains the burden of proof, much as I would like to find, frankly, some evidence to support

[81]Supra, p. 5.
[82]T. R. 274.

> the plaintiff's claim in this case; but it just does not square with my conscience that any of those facts have been proved."[83]

The District Court had the advantage of seeing the demeanor of the witnesses and hearing their oral testimony. This Court does not revise the action of the District Court on such factual issues.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
February 19, 1945.

FELIX T. SMITH,
FRANCIS R. KIRKHAM,
WILLIAM H. MACKAY,
Attorneys for Appellee.

(Appendix Follows.)

[83]T. R. 275.

Appendix.

Deft's Exhibit No. B.
Filed Nov. 3, 1943
C. W. Calbreath, Clerk
By W. Schaerbye

Form 5

WRITE PLAINLY WITH UNFADING BLACK INK—THIS IS A PERMANENT RECORD

Read Instructions on Back.

VITAL STATISTICS

DISTRICT NO. 2101 REGISTRAR'S NO. 62

1. FULL NAME Dr. Arthur Barr

2. PLACE OF DEATH: (A) COUNTY Marin
(B) CITY OR TOWN San Rafael
(C) NAME OF HOSPITAL OR INSTITUTION Cottage Hospital
IF NOT IN HOSPITAL OR INSTITUTION, GIVE STREET NUMBER OR LOCATION
(D) LENGTH OF STAY: (SPECIFY UNSTATED YEARS, MONTHS OR DAYS)
IN HOSPITAL OR INSTITUTION 2 Days
IN THIS COMMUNITY Life IN CALIFORNIA Life
(E) IF FOREIGN BORN, HOW LONG IN THE U. S. A.? YEARS

3. USUAL RESIDENCE OF DECEASED.
(A) STATE California
(B) COUNTY Marin
(C) CITY OR TOWN San Rafael
IF OUTSIDE CITY OR TOWN LIMITS, WRITE RURAL
(D) STREET NO. Forbes Ave. & I street

20. DATE OF DEATH: MONTH June DAY 6
YEAR 1942 HOUR 4 MINUTE 15 AM

3. (E) IF VETERAN, NAME OF WAR: Yes
3. (F) SOCIAL SECURITY NO: No
4. SEX: Male
5. COLOR OR RACE: White
6. (B) SINGLE, MARRIED, WIDOWED OR DIVORCED: Married
6. (C) AGE OF HUSBAND OR WIFE IF ALIVE: 42 YEARS
6. (D) NAME OF HUSBAND OR WIFE: Zella H. Barr

7. BIRTHDATE OF DECEASED: August 16 1890 (MONTH, DAY, YEAR)
IF LESS THAN ONE DAY OLD: HRS. MIN.
8. AGE: 51 YRS. 9 MOS. 20 DAYS
9. BIRTHPLACE: San Rafael, Calif.
10. USUAL OCCUPATION: Dentist
11. INDUSTRY OR BUSINESS:
12. NAME: William Barr
13. BIRTHPLACE: Scotland
14. MAIDEN NAME: Amelia J. Lang
15. BIRTHPLACE: Canada
16. (A) INFORMANT: Keith Ferguson
(B) ADDRESS: 311 California st. San Francisco

17. (A) Entombment (B) DATE: 6-8-42
BURIAL, CREMATION OR REMOVAL
(C) PLACE: Tamalpais Mausoleum
18. (A) EMBALMER'S SIGNATURE: Wm. M. Keaton LICENSE NO. 1885
(B) FUNERAL DIRECTOR: Keaton's Mortuary
ADDRESS: San Rafael, Calif.
BY: Jas. T. Redmond

19. (A) 7-6-42 DATE FILED (B) Harry D. Hund MD REGISTRAR'S SIGNATURE

21. MEDICAL CERTIFICATE
I HEREBY CERTIFY, THAT I ATTENDED THE DECEASED FROM June 4, 1942 TO June 6, 1942
THAT I LAST SAW him ALIVE ON June 6 1942
AND THAT DEATH OCCURRED ON THE DATE AND HOUR STATED ABOVE.
IMMEDIATE CAUSE OF DEATH: Acute bronchial Pneumonia 2 Days
DUE TO:
DUE TO:
OTHER CONDITIONS (INCLUDE PREGNANCY WITHIN THREE MONTHS OF DEATH):
MAJOR FINDINGS OF OPERATIONS: DATE OF OPERATION:
OF AUTOPSY:

22. CORONER'S CERTIFICATE
I HEREBY CERTIFY, THAT I HE
AUTOPSY, INQUEST OR INVESTIGATION
ON THE REMAINS OF THE DECEASED AR
FROM SUCH ACTION THAT DECEASED CA
DEATH ON THE DATE AR
STATED ABOVE.
IMMEDIATE CAUSE OF DEATH
DUE TO
DUE TO
OTHER CONDITIONS
MAJOR FINDINGS OF OPERATIONS
OF AUTOPSY

23. IF DEATH WAS DUE TO EXTERNAL CAUSES, FILL IN THE FOLLOWING
(A) ACCIDENT, SUICIDE, OR HOMICIDE? (B) DATE OF INJURY
(C) WHERE DID INJURY OCCUR? CITY OR TOWN COUNTY STATE
(D) DID INJURY OCCUR IN OR ABOUT HOME, OR FARM, OR INDUSTRIAL PLACE
PUBLIC PLACE? WHILE AT WORK?
SPECIFY TYPE OF PLACE
(E) MEANS OF INJURY

24. CORONER'S OR PHYSICIAN'S SIGNATURE (SPECIFY WHICH) Homer E. Marston, MD
ADDRESS San Rafael DATE 7-3-4

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH

CERTIFICATE OF DEATH

U. S. DEPT. OF COMM
BUREAU OF THE CENSU

INSTRUCTIONS

(1) Write with unfading black or blue-black ink. No other inks are acceptable. Certificates may be clearly typewritten. Every item of information should be carefully supplied.

(2) Age should be stated exactly. If definite date of birth is not known, the age should be stated as nearly as possible.

(3) This certificate must bear the actual signature of the physician or coroner, the person filing the certificate for the funeral home, and the local registrar.

(4) Occupation.—Precise statement of occupation is very important, so that the relative healthfulness of various pursuits may be known. An entry should be made in this section for every person aged 10 years or over. If the deceased has retired from business, the occupation prior to retirement should be reported. Children not gainfully employed may be returned as at school or at home. For a woman whose only occupation was that of home housework, the entry should be housewife. For a person engaged in domestic service for wages, however, designate the occupation by the appropriate terms, as servant—private family, cook—hotel, etc. For a person who had no occupation the entry should be none.

In stating the occupation, avoid the use of such indefinite terms as "employee," "worker," "operative," etc. The particular kind of work done should be stated clearly as spinner, weaver, etc.

In stating the industry or business the use of such general terms as "store," "factory," "mill," etc., should be avoided. The particular kind of store, factory, mill, etc., should be stated as grocery store, soap factory, cotton mill, etc.

The different kinds of engineers should be carefully distinguished by giving the full descriptive titles, as civil engineer, mechanical engineer, mining engineer, stationary engineer, etc. The term "laborer" should be avoided when a more precise statement of the occupation can be secured. The word "mechanic" should not be used but the exact occupation, as carpenter, painter, machinist, etc. A careful distinction should be made between retail merchants and wholesale merchants. The term "clerk" without qualification, should always be avoided. A person who sells goods should be called a salesman. A stenographer, typist, accountant, bookkeeper, cashier, etc., should be reported as such, never as a "clerk."

(5) Physician's Statement of Cause of Death.—The morbid conditions relating to death are divided on the certificate into two groups. In Group I are those related to the "Immediate Cause" of death, and in Group II, those not causally related thereto. In most cases a statement of cause under Group I will suffice. Detailed certification is not desired, the entry of a single cause being preferable in all cases where this can be regarded as adequate (see Example 1), but where the physician finds it necessary to record more than one cause it is important that these be stated in the position provided on the form as indicative of their mutual relationship. This information is sought so that the selection of the cause for tabulation may be made in the light of the certifier's viewpoint:—

(a) Name first the "Immediate Cause" of death, *i.e.*, the disease, injury or complication which caused death (not mode of dying or terminal condition).

(b) Then give other morbid conditions (if any) of which it was the consequence, in order of causal relationship (due to) stating the most recent one first and then others in order.

(c) Entries under Group II should be reserved for "other important contributory morbid conditions" in those instances particularly in which death was due to a combination of maladies, none of which would have been fatal alone. In such cases the physician's judgment alone can afford guidance to the tabulator.

(d) Use always accepted terms for morbid conditions and never record mere symptoms.

(e) Maternal Deaths.—Qualify all diseases resulting from childbirth, miscarriage or abortion by the word "Puerperal," *e.g.*, puerperal septicemia. Distinguish between septicemia originating in abortion and in childbirth.

(f) Cancer.—In all cases the organ or part first affected should be specified.

(g) Violent Deaths.—Coroners, medical examiners and physicians who certify to deaths from violent causes should always clearly indicate the fundamental distinction of whether the death was due to accident, suicide or homicide, and then state the manner and nature of injury. The circumstances of each accident should be stated as fully as possible, *e.g.*, an automobile accident should always be designated as such.

The following examples illustrate the essential principles in the use of the form.

I	Example 1	Example 2	Example 3	Example 4	Example 5
Immediate Cause	(a) Lobar pneumonia	(a) Pulmonary tuberculosis	(a) Acute peritonitis	(a) Bronchopneumonia	(a) Uremia
Morbid Conditions, if any, giving rise to immediate cause (stated in order proceeding backwards from immediate cause).	due to (b) ——	due to (b) ——	due to (b) Acute appendicitis	due to (b) Operation	due to (b) Chronic nephritis
	due to (c) ——	due to (c) ——	due to (c) ——	due to (c) Strangulated inguinal hernia	due to (c) ——
II	II	II	II	II	II
Other morbid conditions (if important) contributing to death but not causally related to immediate cause.	——	——	——	Chronic interstitial nephritis	Chronic bronchitis

SEND 5-NO SIGN STATE PRINTING OFFICE

State of California
County of Marin } ss.

I, F. D. Burrows, County Recorder in and for said County and State, hereby certify that the above and foregoing as hereunto annexed, is a full, true and correct copy of an Instrument of Record in my office, as the same appears recorded in Liber 18 of Certificate Deaths Page 21 of Marin County Records, and that the copy has been compared by me with the original, and is a correct transcript therefrom and of the whole of said original record.

WITNESS MY HAND and Official Seal this 27th day of Oct. A. D. 19 43

F. D. Burrows,
County Recorder

By
Deputy Recorder

No 4155

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, their guardian, *Appellants,* vs. THE TRAVELERS INSURANCE COMPANY, *Appellee.*	No. 10,728
ZEILA BARR, *Appellant,* vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Appellee.*	No. 10,729

(CONSOLIDATED CASES)

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANTS.

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Subject Index

Page

Jurisdictional statement 2

(1) The jurisdiction of the District Court..... 2

(2) The jurisdiction of this Court upon appeal to review the judgments in question..... 2

(3) Pleadings necessary to show the existence of jurisdiction 3

(4) The facts disclosing the bases upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgments in question 3

Abstract of the case 6

Assignment of errors 33

Argument 33

Summary of the argument 33

I.

Under the law of the State of California, a nonsuit can be granted only where there is no evidence from which the Court or jury could draw a reasonable inference that the plaintiff is entitled to recover..... 34

II.

Giving the appellants the benefit of every favorable inference fairly deducible from the evidence, a prima facie case was made, and the trial Court committed error in denying the motion to dismiss..... 41

Conclusion 57

Table of Authorities Cited

Cases

	Pages
Aetna Life Insurance Co. v. Wicker, 240 Fed. 398	55
Amendt v. Pacific Elect. Ry. Co., 46 C. A. (2d) 248, 115 Pac. (2d) 588	37
Anderson v. Stump, 42 C. A. (2d) 761, 109 Pac. (2d) 1027	38
Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381	36
Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723	36, 39
Barnett v. La Mesa Post No. 282, American Legion, 15 Cal. (2d) 191, 99 Pac. (2d) 650	37, 38
Bishop v. Shurly, 237 Mich. 76	47
Boellaard v. Crabbe, 41 C. A. (2d) 792, 107 Pac. (2d) 951	37
Brewer v. Southern Pac. Co., 29 Cal. App. (2d) 251, 84 Pac. (2d) 230	37
Brown v. Beck, 63 C. A. 686, 220 Pac. 14	34
Browning v. Hoffman, 90 W. Va. 568, 111 S. E. 492	47
Bush v. Wood, 8 Cal. 647, 97 Pac. 709	36
Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108	35
Carter v. Canty, 181 Cal. 749	36
Commercial Travelers' Mutual Accident Assn. v. Fulton, 93 Fed. 621	53
Darling v. Dreamland Bedding & Upholstering Co., 44 C. A. (2d) 253, 112 Pac. (2d) 338	37, 38, 39
Dow v. City of Oroville, 22 Cal. App. 215, 134 Pac. 197	44
Dunlap v. Pacific Elec. Ry. Co., 12 C. A. (2d) 473, 55 Pac. (2d) 894	37
Easton v. Ash, 18 Cal. (2d) 530, 116 Pac. (2d) 433	36
Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 114 A.L.R. 1487	34, 35
Estate of Burre, 38 C. A. (2d) 518, 101 Pac. (2d) 549	37
Estate of Cushing, 30 C. A. (2d) 340, 86 Pac. (2d) 375	39
Foley v. Northern California Power Co., 165 Cal. 103, 30 Pac. 1183	46
Freese v. Hibernia Savings and Loan Society, 139 Cal. 392, 73 Pac. 172	39

Pages

Gates v. Pendleton, 184 Cal. 797, 195 Pac. 664 36
Goldstone v. Merchants' Ice Co., 123 Cal. 625, 56 Pac. 776 39
Gregg v. Western Pacific R.R. Co., 193 Cal. 212, 223 Pac. 523 39
Groves v. Webster City, 222 Ia. 849, 270 N. W. 329 47
Grummert v. Fresno Glazed Cement Pipe Co., 181 Cal. at p. 512, 185 Pac. 388 39

Haskell & Barker Car Co. v. Erickson, 73 Ind. App. 657, 128 N. E. 466 47
Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190 35
Hercules Oil Co. v. Hocknell, 5 C. A. 702, 91 Pac. 341 39
Hoffart v. Southern Pac. Co., 33 C. A. (2d) 591, 92 Pac. (2d) 436 36
Home Ins. Co. v. Weide, 78 U. S. 197, 11 Wall. 438, 78 L. ed. 197 53
Hubbard v. Matson Navigation Co., 34 C. A. (2d) 475, 93 Pac. (2d) 846 36, 37
Hubbert v. Aztec Brewing Co., 26 C. A. (2d) 664, 80 Pac. (2d) 185 38

In re Daly's Estate, 15 C. A. 329, 114 Pac. 787 35, 36

Knecht v. Lombardo, 33 C. A. (2d) 447, 91 Pac. (2d) 917 .. 38, 39

Laraway v. First National Bank of La Verne, 39 C. A. (2d) 718, 104 Pac. (2d) 95 37
Leavitt v. Bacon, 89 N. H. 383, 200 Atl. 399 47

Marchetti v. So. Pac. Co., 204 Cal. 679, 269 Pac. 529 36
Marron v. Marron, 19 C. A. 326, 125 Pac. 914 39
Martin v. Tully, 44 C. A. (2d) 226, 112 Pac. (2d) 282 37
McAuley v. Casualty Co. of America, 39 Mont. 185, 102 Pac. 586 51
Meredith v. Winterhaven, 8 L. ed. 1 34
Miller v. Director General of Railroads, 270 Pa. 330, 113 Atl. 373 34
Mitchell Camera Corp. v. Fox Film Corp., 8 Cal. (2d) 192, 64 Pac. (2d) 946 37, 38, 39
Moffatt v. Buffums' Inc., 21 C. A. (2d) 371, 69 Pac. (2d) 424 37

Pages

National Auto Ins. Co. v. Cunningham, 41 C. A. (2d) 828, 107 Pac. (2d) 643 37, 38
Neblett v. Elliott, 46 C. A. (2d) 294, 115 Pac. (2d) 872 36, 38
New York Life Ins. Co. v. Gamer, 303 U. S. 171, 82 L. Ed. 731 53
Nicholson v. Roundup Coal Mining Co., 79 Mont. 358, 257 Pac. 270 46
North Wildwood v. Cirelli, 29 N. J. L. 302 51

Omberg v. United States Mutual Accident Association, 101 Ky. 303, 40 S. W. 909 50

People v. Long, 15 Cal. (2d) 590, 103 Pac. (2d) 969 42
People v. Potigian, 69 C. A. 257, 231 Pac. 593 46
People v. Sampo, 117 C. A. 135, 118 Pac. 957 44

Rabe v. Western Union Telegraph Co., 198 Cal. 290, 244 Pac. 1077 36
Rae v. California Equipment Co., 12 Cal. (2d) 563, 86 Pac. (2d) 352 37
Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946 36
Reiman v. Moore, 30 C. A. (2d) 306, 86 Pac. (2d) 156 .. 38
Reiman v. Moore, 42 C. A. (2d) 130, 108 Pac. (2d) 452 ... 37, 38
Reinoehl v. Hamacher Pole & Lumber Co. (Idaho), 6 Pac. (2d) 860 47
Russell v. Smith, 12 C. A. (2d) 399, 55 Pac. (2d) 562 38

Schuh v. Oil Well Supply Co., 50 C. A. 588, 195 Pac. 703 .. 45
Slater v. Shell Oil Co., 39 C. A. (2d) 535, 103 Pac. (2d) 1043 37, 38
Smellie v. So. Pac. Co., 212 Cal. 540, 299 Pac. 529 36
Smith v. Superior Court, 2 C. A. 529, 84 Pac. 54 35
Spicer v. Benefit Association of Railway Employees, 142 Ore. 574, 17 Pac. (2d) 1107, 90 A. L. R. 1517 46, 47
Stone v. San Francisco, 27 C. A. (2d) 34, 80 Pac. (2d) 175 38
Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 34

Travelers Insurance Co. v. Drake, 89 Fed. (2d) 47 45

Williams v. Freeman, 35 C. A. (2d) 104, 94 Pac. (2d) 817 36, 37, 38, 39
Wires v. Little, 27 C. A. (2d) 240, 80 Pac. (2d) 1010, 82 Pac. (2d) 388 37, 38

Codes and Statutes

Pages

Federal Judiciary Act of 1789, Section 34 35

USCA, Title 28:
Section 41 (Judicial Code, Section 24) 2
Section 225 (Judicial Code, Section 128) 2

Rules

Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Rule 20, Section 2, Subdivision B 2
Rules of Civil Procedure for the District Courts of the United States, Rule 41B 5, 33

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, their guardian, *Appellants,* vs. THE TRAVELERS INSURANCE COMPANY, *Appellee.*	No. 10,728
ZEILA BARR, *Appellant,* vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Appellee.*	No. 10,729

(CONSOLIDATED CASES)

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANTS.*

These appeals present identical questions and have been consolidated for hearing on one transcript as they were consolidated for trial in the District Court. Each is an appeal from a final judgment and order of the District Court dismissing the action with costs.

*Unless otherwise noted, the transcript references are to the transcript in Barr, et al. v. The Travelers etc., No. 10,728.

The first action was brought by the appellants therein, the minor children of Arthur Barr, deceased, against the appellee to recover the sum of $10,000, the said sum being the additional amount payable pursuant to the terms of an insurance policy in which appellants were named as beneficiaries in the event of the death of the deceased from accidental causes. The second action was brought by the widow of the deceased against the appellee for the same amount upon a similar policy.

JURISDICTIONAL STATEMENT.

(Rule 20, Section 2, Subdivision B, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.)

The statutory provisions believed to sustain the jurisdictions are as follows:

(1) The jurisdiction of the District Court.

USCA, Title 28, Section 41 (Judicial Code, Section 24), which provides:

> "The District Court shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000. and * * * is between citizens of different states."

(2) The jurisdiction of this Court upon appeal to review the judgments in question.

USCA, Title 28, Section 225 (Judicial Code, Section 128), which provides:

"The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

(3) Pleadings necessary to show the existence of jurisdiction.

(a) The complaint in William H. Barr, etc., et al. v. The Travelers Insurance Company. (T. R. p. 2.)

(b) The complaint in Zeila Barr v. Equitable Life Assurance Society of the United States. (T. R. p. 2.)

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgments in question.

On January 31, 1943, William H. Barr, a minor, and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, the appellants in No. 10,728, filed in the Superior Court of the State of California, in and for the City and County of San Francisco, the complaint against The Travelers Insurance Company (T. R. pp. 2-19), alleging that on or about the 26th day of February, 1932, the defendant and appellee, in consideration of a premium paid by Arthur Barr, insured the life of Arthur Barr, and executed and delivered to him a policy of insurance, a photostat of which is attached to the complaint, in which the appellants are named as beneficiaries, and that under the terms of the policy appellee agreed to pay to appellants the

sum of $10,000 upon the death of Arthur Barr, and an additional $10,000 immediately upon receipt of due proof that the death of Arthur Barr resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means. After alleging that Arthur Barr paid all premiums falling due under the said policy, sets forth that Arthur Barr died on June 6, 1942, "from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, to-wit, a tick bite suffered by said Arthur Barr on or about the 31st day of May, 1942, and which said tick bite caused a visible contusion on the external body of said Arthur Barr, as well as internal injuries revealed by an autopsy".

After alleging that due notice and proof of death, the cause thereof, were given to appellee, on the forms required, and the making of a demand upon defendant for the payment of $20,000 as required by the policy, further alleges the payment by appellee of the sum of $10,000, and the refusal of appellee to pay the additional sum of $10,000 required by the policy.

On the same day, Zeila Barr, the surviving wife of the deceased, filed in the same State Court the complaint in No. 10,729 against the Equitable Life Assurance Society of the United States upon a policy containing like provisions of which she was the beneficiary, and to recover the same amount.

All of the appellants are citizens and residents of the State of California. The Travelers Insurance Company is a corporation organized under the laws

of the State of Connecticut, and therefore a citizen of that State, while the Equitable Life Assurance Society of the United States is a corporation organized under the laws and a citizen of the State of New York.

Thereafter on petition of the defendant each of said actions was removed from the State Court to the United States District Court for the Northern District of California. (T. R. p. 19.)

Thereafter the defendant in each action filed an answer in which the execution and delivery of the policy and the payment of the premiums called for therein, the presentation of the proofs of death, the making of the demand and the nonpayment of the additional sum of $10,000 payable in the case of accidental death were admitted. (T. R. p. 20.)

Thereafter the District Court made an order consolidating the two actions for trial. (T. R. p. 33.) The consolidated cases came on for trial on November 2, 3 and 4, 1943 before the Court without a jury (T. R. p. 34), and when the appellants had rested their case each of the appellees moved for a dismissal under Rule 41B of the Rules of Civil Procedure for the District Courts of the United States on the ground that upon the facts and the law plaintiff had shown no right to relief. The judgment in each case recites that plaintiff having objected to the said motion, and the motion having been argued by counsel and submitted to the Court for decision, and the Court having found that the motion is meritorious and that upon the facts and the law the plaintiffs had shown no right to relief, it was ordered, adjudged and decreed that

appellants take nothing by the complaints and that the actions be dismissed. (T. R. p. 34.)

Each of these judgments was entered in the District Court November 10, 1943. On January 31, 1944, the appellants in each case filed their several notices of appeal to this Court (T. R. p. 276; T. R. in 10,729, p. 30), together with their separate designations of contents of the record on appeal (T. R. p. 278; T. R. in 10,729, p. 33), and their separate statements of the points on which appellants intend to rely on their appeals. (T. R. pp. 276, 278; T. R. in 10,729, pp. 31, 41.) Counsel for the appellants and for the appellees consenting thereto, this Court made an order that the appeals be consolidated for hearing on one transcript consisting of the pleadings and judgment roll of each of said actions, together with the several notices of appeal and the several designations of the portion of the record to be used on said appeal, and the several statements of the points relied upon by appellants, with a single transcript of the testimony and proceedings in the District Court on the trial of the consolidated actions. (T. R. p. 284.)

ABSTRACT OF THE CASE.

The substance of the pleadings and the proceedings prior to the trial are set forth under the heading immediately preceding this one, and restatement of the same is omitted in the interest of brevity.

At the commencement of the trial (T. R. p. 46), it was stipulated that both policies were in full force

and effect at the time of the death of the deceased, and that proof of death was given, and that the claim was made that the cause of death was acute bronchial pneumonia caused by being bitten by a wood tick about the 31st of May, 1942, in an area that has reported Rocky Mountain spotted fever.

As the testimony of the witnesses does not appear in chronological order in the record, we shall, for the better understanding thereof, relate the evidence in narrative form.

Doctor Arthur Barr, the deceased, was a dentist, practicing his profession in San Rafael, Marin County, California, where he also resided. He resided in San Rafael with his wife and his two children. At the time of his death he had been married approximately 19 years. The evidence shows without conflict that he was a man of good habits, that he was devoted to his family, that he lived a healthy outdoor life and spent much of the time hunting and fishing. He was 52 years of age at the time of his death. Prior to the sudden onset of his fatal illness he was in excellent physical condition. His heart and blood pressure and his arteries were entirely normal. In 1930 or 1931 he was operated on for appendicitis and a hernia, but other than that he had never been attended by a physician during the entire period of his married life.

He was an indefatigable walker, covering as much as eight to 10 miles a day over hills and through brush. There is not a scintilla of evidence that he was suffering from any chronic or organic disorder that might have caused his death.

That he died of Rocky Mountain spotted fever caused by an infection brought on by a tick bite and from no other cause is not only fairly and reasonably deducible from the evidence but is the only inference that may reasonably be drawn therefrom.

On the 26th or 27th of May, 1942, the deceased in company with the witness Louis Nave, whom he had known for nearly 40 years, left San Rafael and went on a hunting trip in the vicinity of Ravendale, in the northeastern part of Lassen County. The antelope season opened on the 28th of May and the deceased and his companion hunted on that day and the two ensuing days. Each of the two men killed an antelope on the trip. After the animals were cleaned they were strapped on a horse and taken back to the ranch where the hunters were camping. The following day they were taken to Reno, Nevada, on a truck. On their arrival at Reno on May 31st the men went to an auto camp, where they proceeded to change clothes and take a shower. As the witness was putting his clothes on he saw two ticks fall off. The witness told Dr. Barr about the ticks, and the latter said, "Well, I had better take a shower, too. Maybe I have some on me." While the deceased was in the shower he called out to the witness, "I have two of them, too. I have one just above my navel." In response to a question by the Court the witness stated that he saw a tick on Dr. Barr about half an inch above the navel, buried in the skin. The tick was imbedded about half of its own length and the witness saw a red or pink spot around the point. This occurred about one o'clock in the after-

noon. About 9 o'clock that evening after the men had retired and were reading in bed the deceased said to the witness, "Look at my arms." The witness saw that Dr. Barr's arms were covered with red spots which looked like measles, and the witness said to the deceased, "What have you got, measles?" The following day Dr. Barr went fishing with another friend at Lake Tahoe, and later in the day the party left for home in the truck. He stated to the witness that on the following day he was going to get a medical examination, or, in his own words, "Maybe there might be something wrong with me. I will go down and get a checkup." The deceased thought that the spots on his wrists which looked like measles might be due to nervousness but he did not complain of feeling ill at any time on the way home. (T. R. pp. 49-101, *passim.*)

The deceased arrived at his home in San Rafael approximately 5 o'clock the same day, June 1, 1942. There he was met by his wife, the plaintiff, Zeila Barr, her mother Mrs. Grace Heydenfeldt, and Mrs. Gertrude Richardson, a family friend, all of whom testified that as the deceased was about to take a shower he pulled up his trousers and showed them a red rash on the back of his legs. (T. R. pp. 248-258, *passim.*) On the following morning, June 2, 1942, the deceased called at the office of Dr. LeRoy H. Briggs, a San Francisco physician, stating that he had recently returned from a hunting trip and wanted to be looked over. He made no complaint except that "on the way up" he had had some pain in his back and he was apparently somewhat concerned over fear of heart

disease. Dr. Briggs subjected him to a thorough physical examination and found that he was normal in all particulars and was "perfectly healthy". His heart, blood pressure, arteries and lungs were normal. The doctor noted that he was a healthy looking man, with a face flushed from exposure to the sun, and was well nourished and well developed. He had no symptoms of any illness. This was on Tuesday afternoon. On Saturday morning he was dead. Dr. Briggs testified that it would have been entirely possible for the deceased to have been in the incubation stage of an infection without any clinical manifestation. In virus infections the incubation period is not uniform.

On the morning of the day when the deceased paid the visit to Dr. Briggs he stated to his wife that he was going to San Francisco to buy some new clothes and that he wanted a "check-up" by Dr. Briggs. He did not state at that time that he was ill. When the deceased came home that evening after the examination he informed his wife that the doctor had told him he was a perfect physical specimen for a man of his age and he was laughing and joking. The following day he went to his dental office in San Rafael in the morning. When he returned home that evening he complained of not feeling well and did not touch his supper. "He just pushed everything to a side." His wife noticed that his face was flushed and very red. On the following morning, which was Thursday, June 4th, Dr. Barr did not arise at his accustomed hour. When he did not come downstairs for breakfast his wife went upstairs to investigate and found that he

was very sick. She describes his face as terribly red and his answers were incoherent. She immediately summonded Dr. Homer E. Marston, the family physician, who came at once. To Dr. Marston the deceased stated that on the previous night he had felt some chills and had fever, and that on the previous day he had suffered from a continuous headache and had had some abdominal discomfort. Accordingly, he had come home early, had taken a cathartic and had gone to bed. He complained that the headache had become more severe, as well as the chills and fever, and that he ached all over his body. The patient also stated that his mind was somewhat confused, and that he had passed a very uneasy night, sleeping at very short intervals. He also complained of a dryness of the mouth. He also stated that he had gone hunting for antelope in Lassen County on May 27th, remaining there until May 31st, and that on the last-mentioned day he had noticed a tick on his abdomen which had been removed by the witness Nave. Dr. Marston found some slight cyanosis of the skin and the patient was somewhat confused mentally. There were also herpes or fever blisters on his lips and his abdomen was tympanitic, or distended with gas. Returning at 5:30 in the afternoon, Dr. Marston found his patient very restless and in extreme pain, and ordered his removal to the Cottage Hospital in San Rafael where special nurses were placed on the case and the patient given fluids intravenously and morphine for his pain. By eight o'clock in the morning the pain had increased, the temperature had risen to 104, the pulse to 130, respiration 30. Certain plood specimens and a spinal

puncture were negative. X-rays revealed numerous areas of consolidation through the right lung and along the main stem bronchus in the left lung, and the heart showed a well marked lack of muscle tone. The conclusions of the doctors and of the roentgenologist were that the patient was suffering from widespread pneumonia of the influenzial type. During the day the patient became progressively worse, and about eight o'clock that evening lapsed into unconsciousness. By that time he was very cyanotic and his respiration so labored that he was placed in an oxygen tent. None of these methods or means of therapy did any good and Dr. Barr expired the following morning, June 6th, at 4:25 A.M. The Doctor further testified, "The diagnosis was acute bronchial pneumonia, cause unknown. (T. R. p. 214.) On the 12th of June a blood specimen was sent to the Bureau of Laboratories at Berkeley, and an examination made by a Dr. Eaton, and they made blood tests of this blood serum and agglutination tests for plague, tularemia and six strains of proteus, which were reported on the 15th to me as all negative. I reported this to the State Board of Health. I don't remember whether I reported it by phone or by mail. That was before Dr. Barr's death. I said that there had been a tick bite and of course I was not sure of my diagnosis. I did not know the exact cause of death outside of the bronchial pneumonia. I was present at the autopsy, which took place in Keaton's Undertaking Parlor in San Rafael on June 9, 1942. There were several other doctors present. I made a gross examination, or gross observations, while the autopsy was being performed. It

showed patches of consolidation in both lungs. (T. R. p. 215.) I have formed an opinion as to what relationship the tick bite bears to this case and to the terminal cause of death, bronchial pneumonia. **I have felt that due to the history of the tick bite in an area where there have been cases reported of tick bite fever, and due to the abruptness of the onset, the mental confusion, nervousness, extreme pains, incubation period of approximately three or four days—I felt that it was most likely due to tick bite. I did see a few pink spots on the left arm or shoulder. I don't remember how many,** but the pathologist called attention to these few pink spots in that region. They appeared to be petechial spots. Chills, fever, headache, abdominal discomfort, in addition to the history of a tick bite, are symptoms which they have in Rocky Mountain spotted fever. That would be the symptoms I would expect to find in a patient who related that he had been bitten by a tick which I suspected to carry Rocky Mountain spotted fever. (T. R. pp. 215-217.) I have testified that on the same day I found he was suffering from aches and pains all over his body, that he was cyanotic, that he was confused mentally, had herpes of the lips, his tongue was dry and coated, his abdomen was swollen, his temperature was 102, pulse 120, and his respiration 20,—all of those were symptoms which are usually found in Rocky Mountain spotted fever cases. Those are the things that I would expect to find in a Rocky Mountain spotted fever case, at that stage of the case. I sent these blood specimens, together with the fluid taken in the spinal puncture, to various laboratories for examination. They were nega-

tive. There is nothing conclusive about the fact that those examinations were negative. It is a common occurrence or experience in taking blood tests not only in Rocky Mountain spotted fever but in many other fevers that such tests result negatively. In the early stages of Rocky Mountain spotted fever, blood tests are not entirely relied upon. On the afternoon of June 4th the deceased was very uncooperative, and when you asked him to do things he didn't seem to understand what you were trying to get at. He wouldn't take nourishment. He was trying to get out of bed. (T. R. p. 219.) In fact, we had to have two nurses in there at one time because he just didn't seem to know what he was doing. He was in delirium. He was delirious when we brought him to the hospital. At 4:30 in the afternoon he was definitely delirious. He never came out of this delirium until his death the following Saturday morning. In addition to the other things, he was shouting and yelling very loudly. I said that on that afternoon about 5:30 I found him markedly confused, restless, dehydrated, extreme pain all over his body—those are the symptoms I would expect to find in a Rocky Mountain spotted fever case at that stage. **All the symptoms as I have related them and his actions were indicative of Rocky Mountain spotted fever throughout the time I had him under observation.** (T. H. p. 220.) I had not noticed the petechial spots that I saw on his arm at the time of his death during his lifetime. I looked for a rash or petechial spots during his lifetime but I did not notice any. The morning Dr. Reed was there, there was just a faint flushing of the skin, a redness of the upper part of his

back. That was the only change that we saw. It is a medical fact that where the onset of such a disease as Rocky Mountain spotted fever is as sudden as in this case, the prosecution is so fast or swift and death ensues within such a short time that rashes do not always occur. **There have been cases where no rash has ever been found and where it was definitely Rocky Mountain spotted fever.**" (T. R. p. 221.)

On the day of the autopsy, or the previous day, Mrs. Barr found a tick on Dr. Barr's clothes. She delivered it to her brother-in-law, Keith R. Ferguson, who in turn delivered it to Dr. Moody.

The tick was of the species known as the Dermacentor andersoni, a notorious carrier of Rocky Mountain spotted fever, which subsists upon animal blood and fastens itself upon human beings. Its chief habitat is in the Bitter Root Mountains which form a natural barrier between the States of Montana and Idaho, but it is found in the Sierra Nevada Mountains, and is particularly numerous in Lassen County. The testimony shows that it is frequently found on antelope, deer and other wild game in that locality.

That this particular species of tick transmits the spotted fever is well recognized by the medical authorities. The American Illustrated Medical Dictionary (W. B. Saunders Co., 19th Ed., 1941), contains the following definitions:

"**Rocky Mountain Spotted Fever:**

An infectious disease of the regions of the Rocky Mountains, characterized by high fever, pains in the bones and muscles, headache, a red, spotted

eruption which may become dark and confluent, and by mental symptoms. Probably caused by a blood parasite (Dermacentroxenus Rickettsii) which is transmitted by the ticks, Dermacentor andersoni (venustus), the American dog tick, Dermacentor variabilis, and the rabbit tick, Haemaphysalis leporispalustris. Diseases resembling Rocky Mountain spotted fever exist in other parts of the United States and of the World. An Eastern form occurs over eastern United States; it is transmitted by Dermacentor variabilis.

"**Dermacentor Fever:**

A genus of ticks. D. andersoni, a handsome reddish-brown species of wood tick which is responsible for transmitting Rocky Mountain spotted fever to man and for causing **tick paralysis** and **tularemia**. Its first and second hosts are rodents, especially squirrels, while its third hosts are domestic animals and man."

In the edition of "Life" of September 7, 1942 (p. 92) there is a full page photograph, many times magnified, of both the male and female Dermacentors Andersoni, and at page 93 the following article appears:

"**Rocky Mountain Spotted Fever.**

U. S. vaccinates 200,000 against tick disease.

There has been more Rocky Mountain spotted fever in more localities in the country this year than ever before. This is both because the fever is spreading over the country and because doctors are learning to recognize it. Scientists are girding themselves for a widespread fight against this ferocious fatal disease.

Center of the bitter battle is peaceful Bitter Root Valley in western Montana, where the disease was first identified by U. S. Public Health Service doctors. At Hamilton, in the country's most dangerous laboratory, they have found a preventive vaccine which is 75% effective. Once an unvaccinated person gets the disease he is fated to die unless his own body can throw off the infection. Only hope is a new serum which may save some lives otherwise doomed.

For years before the scientists came, people had sickened mysteriously in the valley, burned with sudden fever, flamed with red-purple rash and died. The farmers said it was from drinking melted snow-water. But the medical detectives found it was a virus transmitted to many by a little bloodsucking insect—the tick.

Several species of tick carry the virus in their bodies. But the **Dermacentor andersoni** carries the most virulent or 'hot strain' of those so far discovered. To reproduce, ticks must have blood. After lying low in the shrubbery they suddenly emerge in the spring, climb up on a blade of grass or twig and wave their legs in the air to catch on any passing mammal. Once they find a piece of live flesh, they bore under the skin and suck blood. When they feed on man, he does not feel their bite. As their host, other animals shown no symptoms of disease.

Male tick gets enough blood in three days, but female hangs on until she is engorged, usually at least ten days. As she feeds, she either draws virus from an infected animal or deposits her own in its bloodstream. When full, she drops to the ground, lays her eggs and dies. Baby ticks hatch

> out in a month, each one carrying spotted-fever virus, and the cycle of tick to animal to tick to man starts over again."

The article is accompanied by other illustrations, pages 94 to 97, showing the manner in which these ticks are collected and ground up to make vaccine with which human beings are inoculated against the disease.

In the June, 1944, edition of *Squibb Memoranda,* a magazine published by the medical department of E. R. Squibb & Sons, 475 Fifth Avenue, New York, practically the entire issue is devoted to disease-carrying ticks, and the diseases which they transmit from animals to human beings. The various articles are illustrated with maps showing the locales of the different diseases transmitted by these pests, together with diagrams and enlarged photographs, both of the known breeds of ticks and of the disease germs which they carry. As it is manifestly inconvenient, if not impossible, to reproduce these illustrations in this brief, we shall, if we are able to obtain them, file a sufficient number of copies of each of these magazines with the clerk for examination by the Court.

The first article in the Squibb publication is a biography of Dr. John F. Anderson of the United States Public Health Service, whose research in 1903 led to the discovery of the tick as the vector of Rocky Mountain Spotted Fever, and after whom the **dermacentor andersoni,** the tick involved in the instant case, was named. There follows an article on typhus fever, a disease similar to spotted fever, but usually transmitted by the body louse or the flea. We mention this

article because it contains a description of Rickettsia, an organism named after Dr. Ricketts, its discoverer, which are present in the blood of infected men, animals and lice, and which are frequently mentioned in the medical testimony in the case at bar. Following the article on typhus there is another entitled, "Ticks as Vectors of Disease." It is there stated *inter alia:*

> "The most virulent of the tick-borne, rickettsial diseases in the United States is Rocky Mountain spotted fever."

There follows this article another, entitled, "Rocky Mountain Spotted Fever". This is illustrated with maps, one of the globe, showing the geographical distribution of rickettsial diseases, other than true typhus fever; the other a map of the United States alone, showing the distribution of Rocky Mountain Spotted Fever by counties. We print the treatise in full in the margin.*

*"**Rocky Mountain Spotted Fever.** At the turn of the century Rocky Mountain Spotted Fever was known only in western Montana and southern Idaho. In the spring of 1902, Wilson and Chowning of the University of Minnesota, investigated this disease in the Bitter Root Valley of Montana. They furnished evidence that the disease is not contagious, and they concluded that it apparently is transmitted by a tick, for several reasons, chief of which were the seasonal distribution, the sharply limited sites of occurrence, and the history of tick bite given by every patient.

"On April 22, 1903, Doctor John F. Anderson, who was then Passed Assistant Surgeon and Assistant Director of the Hygienic Laboratory, United States Public Health and Marine-Hospital Service, was instructed to proceed to Montana to investigate spotted fever. As a result of his investigation, a bulletin entitled 'Spotted Fever (Tick Fever) of the Rocky Mountains: A New Disease' was published in July 1903 by the Government Printing Office.

"The disease had been known in the valley of the Bitter Root river in western Montana for about twenty years. It was sharply

It will be apparent at once from the testimony of Dr. Marston that the deceased, both from the clinical history of the case and the symptoms, such as the rash, the high fever and the cyanosis, was suffering from Rock Mountain spotted fever, which developed into pneumonia, which latter disease was the ter-

localized on the west bank; cases occurred on the east bank only in persons who had visited the west side. Anderson found that it was not confined to the Bitter Root Valley but had been known clinically in Idaho for many years, cases also being reported in Nevada, Wyoming and eastern Oregon.

"For more than twenty years thereafter, Rocky Mountain spotted fever was believed to be confined to the northwestern states. However, with the passage of time cases were reported from other western states, and in 1930 its existence in the Alleghanies was established. Today there are only six states from which it has not been reported—Maine, Vermont, Rhode Island, Connecticut, Michigan and Kansas. It is often referred to as being of two types, western and eastern. However, it is doubtful if this differentiation is justified. While it is true that the tick vectors in the East and West are different species of the genus Dermacentor, yet the infections transmitted by them are completely identical immunologically and there are no essential clinical or pathologic differences either in man or in experimental animals.

"Anderson reported that Rocky Mountain spotted fever prevailed exclusively in spring and early summer. This seasonal occurrence is now accepted, and known to be due to the active period in the life of the tick vector. In the western states the majority of cases occur in April, May and June; in the eastern states, in June, July and August.

"Anderson also reported that the fever was not contagious because it never occurred in two persons in the same family during any one season. It did develop in persons exposed to the bite of ticks, such as stockmen, sheep herders, miners, ranchmen and others whose duties took them into the brush. In the West it still occurs chiefly in men engaged in outdoor occupations; in the East, because the common dog tick is the natural vector, it quite frequently attacks women and children.

"In 1902 Wilson and Chowning had searched for the parasite causing spotted fever but their attempts and those undertaken in 1903 by Anderson were unsuccessful. Not until many years later was the organism identified as belonging to a new group, the rickettsiae; specifically, it is *Rickettsia rickettsi* (*Dermacentroxenus rickettsi*). (For further discussion of rickettsiae, see page 8.)

"Transmission. Study of the patient's history always revealed a tick bite about one week before onset of Rocky Mountain spotted

minal cause of death. (T. R. p. 216.) The testimony of Dr. Briggs, who examined the deceased on June 2, 1942, is to the following effect:

> "Knowing that he was perfectly healthy on Tuesday afternoon and that he was dead on Saturday morning, I would say that it was possible for him to be healthy as far as any ill sign went

fever. Anderson was therefore led to the belief that ticks were necessary for the transmission of the disease, although he noted that carefully controlled experiments would have to be made before this conclusion became definite. He wrote:

" 'The life history of the organisms of malaria and Texas fever naturally suggested that some insect was concerned in the transmission of the disease. On investigation it was found that the ticks appeared in the valley about the last of February, but were inactive until the middle of March or first of April, the first cases of fever appearing about the last of March. The ticks began to diminish greatly in number from about June 1, and after the middle of July very few were seen; the cases of fever also begin to diminish about June 1, the latest date on which the disease has been known to occur being July 20.'

"It was found that the ticks prevailing in the Bitter Root Valley belonged to the genus *Dermacentor* but differed from the *Dermacentor variabilis,* the common dog tick of the eastern states. Specimens were forwarded by Anderson to Charles Wardell Stiles, Zoologist in the United States Public Health Service, who identified them as a new species and, in recognition of the contribution of Doctor Anderson, named it *Dermacentor andersoni.* However, proof that the tick was the vector was not obtained until 1906 when Ricketts effected transmission of the etiologic agent from guinea pig to guinea pig by the *Dermacentor andersoni.* At the time he thought he was working with *Dermacentor occidentalis,* a tick which is an effective laboratory transmitting agent and is probably a vector in nature but has never been found naturally infected. *Dermacentor andersoni* is now known to be the chief agent transmitting the Rocky Mountain spotted fever parasite to man in the western states, *Dermacentor variabilis* being the common vector in the eastern and central states. Recently another tick, *Amblyomma americanum,* has been proved to be a transmitting agent along with *Dermacentor variabilis.* This species occurs in the southeastern and southcentral states.

"Symptomatology. Parker (United States Public Health Service) has described the clinical picture. The usual ambulatory patient has low fever, scanty rash and very slight malaise. In fulminating cases the rash, if present at all, coalesces and forms

on Tuesday and still be in the incubation stage of some disease. A man could be in an incubation period of pneumonia, or of any of the acute infections, and if he had a normal temperature there would be no way by which you could tell. He had no specific complaints except this backache which he had, which is a very frequent sign of infection and which he had had some 10

ecchymotic blotches; evidence of central nervous system involvment appears early; and death occurs in three to five days.

"The incubation period is two to five days in the more severe infections and three to fourteen in milder ones with, possibly, a prodromal period of two to three days characterized by anorexia, irritability, malaise and chills. The symptoms most often noted at onset are frontal and occipital headache, intense aching in the lumbar region and marked malaise. Other manifestations are sweating, injection of conjunctivae, photophobia, pain in abdomen, bones and muscles, nosebleed, nausea, vomiting, an apprehensive expression and cyanosis.

"The rash usually appears on the second to fourth day but may be delayed until the sixth. It is most frequently observed first on the wrists and ankles, less commonly on the back. At the beginning it is pale to bright rose and commonly macular but sometimes papular. It extends rapidly to most of the body but is usually less marked on the abdomen and face. At first the color disappears on pressure; later it does not, the skin becoming darker and bluish. Large, scattered, bright spots indicate a better prognosis; small, dark, dense areas denote more severe infection.

"The febrile period is usually two to three weeks. In milder infections fever increases slowly to a possible maximum of 103° F. In fatal types it rises more rapidly to a maximum of 104° to 106°. Morning remissions are frequent. The maximum temperature usually persists for about two weeks and falls by lysis. The pulse is full and strong at first, and may not exceed 90 a minute in less toxic patients; in more toxic patients it may become shallow and range from 110 to 160.

"Diagnosis. Anderson called attention to the fact that clinically typhoid fever closely resembles spotted fever but that differential diagnosis is easy because of the characteristic rose spots, diarrhea, Widal reaction and presence of typhoid bacilli in the blood in typhoid fever. He wrote that spotted fever more closely resembles typhus than any other disease and that cases of typhus fever occurring in a locality where spotted fever prevailed would 'without a blood examination and close bedside observation, cause much trouble in diagnosis.' Differentiation from typhus fever

days before. By a specific infection we mean an infection that is due to a definitely known cause, like the typhoid bacillus or the pneumococcus, or one of the virus diseases. There is usually a period of varying length from the time the individual gets the noxious agent of pneumococcus or the typhoid bacillus—the particular virus—until the time that it becomes in sufficient quan-

would be made because of the longer period of incubation in typhus, absence of history of tick bite, appearance of the eruption on the abdomen and chest first with later extension to the extremities, and prevalence throughout the winter.

"The years since 1903 have naturally brought developments in laboratory diagnosis of diseases of this type. They have not, however, been especially helpful in spotted fever because specific findings occur rather late in the course of the disease. The Weil-Felix test becomes positive in about ten days and rises continually for some days thereafter, but this is not helpful in differentiation from typhus because the test is also positive in the latter disease. The transmission test, or infection test, made in guinea pigs, may require several animal passages and therefore is of limited assistance. Protection tests in guinea pigs require facilities not generally available. A specific complement fixation test has recently been devised; it becomes positive about the tenth day and may remain positive for years, and gives promise of becoming a useful means of differentiating Rocky Mountain spotted fever from typhus fever.

"Therapy and Prophylaxix. Treatment in 1903 was symptomatic and it is still limited to general supportive measures. The sulfonamides have been tried but found to be not only useless but actually contraindicated. There is also evidence that intravenous therapy is dangerous regardless of the drug used. Experimentally tyrothricin has not proved effective. Penicillin is not likely to be used in view of the fact that the rickettsia is gram-negative.

"Measures to protect against tick bite in persons compelled to work in tick infested territory, such as protective clothing, are helpful.

"Topping (United States Public Health Service) has reported experience with an immune serum produced in rabbits by the use of live virus. As a result of observation in fifty-two human cases, he concludes that this serum may offer hope in the treatment of Rocky Mountain spotted fever, particularly if administered early in its course.

"Protective vaccination by means of a phenol-formalized emulsion of ground-up infected ticks (*Dermacentor andersoni*) was

tity to give the person symptoms. A person could have some sort of a disease and still a doctor wouldn't know until a certain stage had been reached. That is true of a common cold. It is true of practically all infections. (T. R. p. 69.) * * * A condition of infection in some diseases, particularly pneumonias, may precede the existence of any clinical signs. I think that is true of nearly

first used in 1924 by Spencer and Parker. According to Parker, only 64 of 15,000 persons vaccinated in an endemic area developed spotted fever. In 1941 Parker reported results of fifteen years' experience with the vaccine; it appeared to have definite immunizing value, protecting for about a year, at the end of which time the individual could be re-immunized. A vaccine is now available which is prepared by growing the rickettsiae in yolk sacs of fertile hen's eggs according to the method of Cox. Widespread use of vaccine is not considered advisable but restricted use is advocated in persons living or working in areas where exposure to infected ticks is reasonably certain.

"Bibliography:

Wilson, L. B., and Chowning, W. M.: J.A.M.A. 39:131, 1902.

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Ricketts, H. T.: J.A.M.A. 47:358, 1906.

Parker, R. R.: J.A.M.A. 110:1185, 1273, 1938.

Topping, N. H.: Pub. Health Rep. 58:757, 1943.

Parker, R. R.: Am. J. Trop. Med. 21:369, 1941.

"Summary:

"(1) In 1902 and 1903 Rocky Mountain spotted fever in Montana and Idaho was investigated and found to be probably transmitted by ticks and related to typhus fever.

"(2) Rocky Mountain spotted fever is a rickettsial disease caused by Rickettsia rickettsi. It has been reported from almost every state in the Union. In the West the chief vector is the wood tick, *Dermacentor andersoni,* and in the East it is the common dog tick *Dermacentor variabilis.*

"(3) The disease is characterized by a fever which usually persists for two to three weeks and terminates by lysis, and by an eruption which appears first on the wrists and ankles and then spreads along the limbs and to the back and chest, fading with defervescence:

"(4) Differential diagnosis is by symptomatology, history of tick bite, an occurrence during a definite season. Treatment is symptomatic. Protective immunization is available for persons exposed to the bite of infected ticks."

every infection. It is what we speak of as the incubation period. The incubation period is not uniform. I did not specify as to any length of time. I would say the usual incubation period of the ordinary diseases is from a day to a month. My answer would be 'no' to the question that in virus pneumonias the picture of the chest disclosed by the X-ray is far in advance of any symptoms that are shown externally by the patient or on examination with a stethoscope. I think what you are trying to get at is that the picture given by the X-ray is more marked than the signs are elicited in the examination of the chest. The man would not have had a normal temperature had he had a virus pneumonia. He does not have a pneumonia in the incubation period. (T. R. p. 77.)"

The rest of the testimony produced at the trial needs no extensive discussion, as it is entirely of that uncertain and unsatisfactory nature which commonly characterizes the testimony of doctors and pathologists. Certain blood specimens of the deceased taken on June 4 or June 5 were examined on June 12 by Malcolm H. Merrill, Chief of the Division of Laboratories of the California State Health Department. The material portion of his testimony is as follows:

"I stated we tested the serum from this blood with agglutination against known bacterial suspensions. We did not get any positive results of any kind or character. Our tests were directed only against those three conditions, and we had no evidence that any of those three were present. We looked for no other agents as that in the blood culture and we found no other organisms. If there had been an organism such as an outside

organism or something of that sort it should have shown up in the culture. I could hardly say that any other organism that I regard as infectious or which might result in death should have shown up in the culture, because the culture technique used would not support the growth of all pathogenic organisms. (T. R. p. 112.) I would say the investigation would have supported a determination with respect to some pathogenic organisms in addition to the three I mentioned specifically. I found none of these. I think it is safe to say as far as my determination was concerned I found nothing that would indicate the cause of death. I am engaged very often in making laboratory determinations concerning blood specimens. The information we had was that the blood specimens in this case were taken within a day or two after the onset of the disease. (T. R. p. 113.) With some of the procedures that we use, we would expect a positive reaction in a specimen which is taken a day or two after the onset of the disease. I refer in that connection to cultures and the animals inoculations. There are varying factors: The factor of time in the disease is the important one, of course. There would be variations as the disease progresses. (T. R. p. 114.) I mean we would expect to find organisms in the bloodstream at certain stages of the disease, and not at others. In Rocky Mountain spotted fever we would expect to find organisms in the bloodstream the first week of infection—as soon as the acute symptoms begin. By 'acute symptoms' I mean as soon as the man really gets ill. There isn't anything absolute, of course, in it. But I say in general we would expect to find the organisms present early in the infection. Similar tests had been

made in the laboratory. I have supervised tests on tularemia and plague, but not specifically in previous instances on Rocky Mountain spotted fever. The condition in which the blood is kept in the interim between the taking of the whole specimen and the receipt of that specimen and the performance of the experiment by ourselves have an influence on the accuracy of the determination. (T. R. p. 116.) There is not only the question of temperature; there is the question of time. In general, the lower the temperature the longer the agent will survive. The organisms must have viability. In other words, life. Time enters into the question as to whether they do or do not have life. The interval elapsing would have an influence regardless of what that interval is. The organisms tend to die out after the specimen is taken. Whether I would regard seven or eight days as a rather considerable interval elapsing between the taking of the specimen originally from the subject and the beginning of the performance of my experiments or demonstrations as an unusual length of time would depend upon how the specimen is taken and how the specimen is kept. Keeping in mind that this specimen was kept in a refrigerator, the lapse of seven or eight days would have an influence on the possibility of success in my tests. (T. R. p. 117.) After the lapse of that length of time, even though the specimen was kept in a refrigerator the organisms might not be viable, but on the other hand, they might be. I have no way of determining that but by the experience of others who have done a similar type of work. Experiments could be devised to demonstrate the rate of loss of viability of a blood specimen with time. **Nothing was done in that**

regard with this case because we received the blood date, that is, after the time interval I have mentioned. (T. R. p. 118.) It is pretty difficult in a diagnostic test to say that any test is conclusive. I would have to answer 'No' to your question as to whether I would regard the tests which I made as a conclusive determination as to whether they were or were not the organisms of anything I was looking for in the blood in this case. (T. R. p. 120.)"

The Director of the Research Laboratory of the State Department of Public Health, the witness Monroe D. Eaton, testified that he had made some experiments with a part of the same specimen of the blood of the deceased by inoculating four cotton-rats, by methods needless to be discussed in detail. The pertinent portions of his testimony may be summarized as follows:

"The results of my infection of the rats were entirely negative. The pathology was that of a virus pneumonia. (T. R. p. 135.) It is awfully hard to state this without using technical language. The character of the exudate in the lungs and the cellulary action around the bronchi and blood vessels was very much the same as that which we see in other cases of virus pneumonia. We saw no bodies which we could identify positively. We saw no rickettsial-like bodies. I think the pathology was very suggestive. It was very definite that the man had a pneumonia, probably due to virus;—a virus is defined in the dictionary as a harmful or noxious agent. The term generally means a submicroscopical organ-

ism which is not cultivated in the ordinary media used for the demonstration of bacteria. I did not regard my investigation and tests with the rats as conclusive because we did not have proper specimens for this sort of a test. We were interested in the case because it was reported as a virus pneumonia. We used these animals to demonstrate one of the agents which we believe caused virus pneumonia. Blood is not the proper specimen to use for these tests. We should have had sputum, or specimens of fresh lung tissue, which we did not have. (T. R. p. 136.) We knew that the specimens or sections of lung that were taken and submitted to us in this case showed evidence that the body had been embalmed before sections or specimens were taken. We should have fresh lung tissue for the purpose of isolating the causative agent. We did no animal inoculation with the lung tissue because of the fact that the body was embalmed and therefore any evidence that would be in there would be dead and not transmissible to the animals which we inoculated. When I speak about the examination that I made of the lung tissue, I am speaking about microscopic examination."

On cross-examination, the same witness testified:

"The inoculation which I made in the cotton-rats was partly for typhus and unusual rickettsial strains; partly because the cotton-rat, according to some of our previous experiments, is susceptible to the agent which causes virus pneumonia or primary atypical pneumonia. The result of my inoculation experiments was negative. That was the result that I would ordinarily expect to get,

as far as I know, from a virus pneumonia case. Ordinarily the agent does not occur in the blood, or, of so, only transiently in some forms of virus pneumonia. A virus is an organism which is not visible under the microscope; that is the definition that is generally used. A rickettsial body, on the other hand, is a bacterium-like body which may be seen microscopically. We did not see any rickettsial bodies in our examination of tissues from Dr. Barr's body. We are not expert in doing that, however. I did not find the pathology and the specimens from Dr. Barr to differ essentially from those specimens which I examine in the ordinary rapidly fatal case of virus pneumonia. From my observations and experiments, there was nothing which prompted me to believe that the cause of the pneumonia was rickettsial in nature." (T. R. pp. 137-139.)

On redirect examination, the witness testified:

"I was looking for rickettsia in the light of the history of the case. That is one of the reasons we sent the blood to Dr. Merrill for guinea pig inoculations. (T. R. p. 139.) We were not specifically looking for rickettsia in this case. We always look for bodies in a plasma of this large amount of nuclear cells which you see in the lungs of these cases, either rickettsia or other virus bodies. There haven't been any cases of Rocky Mountain spotted fever that die in two or three days with a pneumonia of this type. **I have gone into the question of how frequently pneumonia occurs in rickettsial diseases. In rickettsial diseases pneumonia occurs very, very often after the disease is full blown * * * the pneu-**

monia is not necessarily due to the rickettsial disease. It may be a secondary bacterial infection. I said all pneumonia from which people die following rickettsial infections, like typhus and spotted fever, may be due to bacteria other than rickettsial diseases. * * * You are correct in stating that the infectious tick transmits the rickettsia to the bloodstream of the human being upon which it feeds. That rickettsia is carried through the bloodstream and lodges some place in the body. It is not necessarily a fact that a germ will usually attack a weak spot in a human being. Pneumonia is due to the weakened condition of the patient. I would not say that that is evidence that the rickettsia invades the lungs. In these cases people die quite frequently of pneumonia." (T. R. pp. 139-141.)

Dr. Karl F. Meyer, Director of the Hooper Foundation of Medical Research of the University of California and Professor of Bacteriology, testified that in June 1942, with Drs. Rusk and Moody, he made an examination of specimens of the lung tissue of Dr. Barr. He state:

"I recognized in certain patches of the lung sacs peculiar bodies which I could not identify with the eosin-hematoxylin stain. * * * You couldn't say that there were bodies in those sections or specimens other than virus. An elementary body—the term is used to express a corpuscular element which is within the cytoplasm nucleus of a cell. Now, whether that is produced by a virus or is a virus itself—that is naturally a matter which cannot be decided without experimental tests. The microscope in this

respect is merely a tool to lead you in certain directions as to what you should do. If there were rickettsia present in those specimens, you might find clusters of coccoid, broad-shaped elements, which I want to put into the record are very difficult to stain, and you have to use special staining methods to do that. In fact, to be perfectly frank, some people have extreme difficulty in demonstrating rickettsial bodies in sections, because there are layers upon layers of cells. In other words, instead of having one thin film of cells you have two or three layers of cells on top of it because you can only count two or three. There were elementary bodies in the cytoplasm. Some of them naturally were in small aggregates. If I found rickettsia I would expect to see them in aggregates. An elementary body in many cases could be said it was rickettsial-like, but that is naturally a question of terminology. **I knew the body had been embalmed. That added an obstacle to my eventual determination. Considering this tissue had come from a body which had been embalmed, I wouldn't commit myself on whether the bodies that I saw were rickettsia or elementary bodies. They could be rickettsia or they could be other bodies.''** (T. R. pp. 150-156.)

No further testimony need be referred to, as we have set forth enough to sufficiently fortify the argument of appellants.

ASSIGNMENT OF ERRORS.

1. The District Court erred in granting the motions of each of the appellees for a dismissal under the provisions of Rule 41-b of the Rules of Civil Procedure for the District Courts of the United States. (T. R. pp. 34, 272, *et seq.*)

2. The said District Court erred in stating that the said motions were meritorious and that upon the facts and the law plaintiffs had shown no right to relief. (T. R. pp. 273, *et seq.*)

3. The evidence introduced and received upon the trial of the cause established *prima facie* the right of plaintiffs to judgment as prayed for in their complaints in each of these actions.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Federal Courts Follow the State Law in Cases Commenced in or Removed to Them Because of Diversity of Citizenship, and, Therefore, it Was the Duty of the Trial Judge, in Passing Upon the Motions to Dismiss for Failure of Proof, to Follow the Law of the State of California as to Dismissals or Nonsuits for Failure of the Plaintiff to Prove His Case. Under the Law of the State of California, a Nonsuit May be Granted Only Where There is No Evidence Which Either Directly or by Reasonable Inference Tends to Support the Plaintiff's Case. In the Case at Bar, There Was Evidence Amply Sufficient to Have Warranted an Inference that the Deceased Met His Death by

Reason of an Infection Caused by the Tick-Bite, and the Trial Judge, Therefore, Erred in Granting the Motions of Defendants.

I.

UNDER THE LAW OF THE STATE OF CALIFORNIA, A NONSUIT CAN BE GRANTED ONLY WHERE THERE IS NO EVIDENCE FROM WHICH THE COURT OR JURY COULD DRAW A REASONABLE INFERENCE THAT THE PLAINTIFF IS ENTITLED TO RECOVER.

In matters of general as well as local law, the Federal Courts follow the law of the state in which the federal district is located.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 114 A.L.R. 1487.

In cases commenced in the Federal Court because of diversity of citizenship, or removed from state to Federal Courts for the same reason, the state law is followed by the Federal Courts.

Meredith v. Winterhaven, 8 L. ed. 1;
Brown v. Beck, 63 Cal. App. 686, 220 Pac. 14;
Miller v. Director General of Railroads, 270 Pa. 330, 113 Atl. 373.

In *Erie R.R. Co. v. Tompkins,* supra, the Supreme Court of the United States, overruling the earlier case of *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865, held that in an action in the Federal Court for the Southern District of New York brought by the plaintiff, who was a citizen of Pennsylvania, for injuries received by reason of the negligence of the defendant

railroad company in the latter state, it was the duty of the Federal Court to follow the common law of Pennsylvania as declared by its highest Court. The Court quotes with approval *Hawkins v. Barney,* 5 Pet. 457, 464, 8 L. ed. 190, 193, in which it is said that Section 34 of the Federal Judiciary Act of 1789

> "has been uniformly held to be no more than a declaration of what the law would have been without it, that the *lex loci* must be the governing rule of private right **under whatever jurisdiction private right comes to be examined.**"

Even without *Erie R.R. Co. v. Tompkins,* it would have been the duty of the District Court in the instant case to have followed the law governing nonsuits as pronounced by the California decisions, because the Act of 1789 specifically provides:

> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The law governing the power of a trial Court to grant a nonsuit is well settled by the California decisions. A motion for a nonsuit involves the legal effect of admitted facts. (*Smith v. Superior Court,* 2 Cal. App. 529, 84 Pac. 54.) When made at the close of plaintiff's case, it in purpose and effect operates as a demurrer to the evidence, and must therefore assume that all the evidence in favor of the plaintiff, if relevant to the issues, is true. (*Butler v. Hyland,* 89 Cal. 575, 26 Pac. 1108; *In re Daly's Estate,* 15 Cal. App.

329, 114 Pac. 787; *Bush v. Wood,* 8 Cal. 647, 97 Pac. 709.)

In *Archibald Estate v. Matteson,* 5 Cal. App. 441, 90 Pac. 723, the Court says:

> "It is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purpose of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading."

Therefore it is well settled that upon a motion for nonsuit all the evidence must be construed most strongly against the defendant. (*Gates v. Pendleton,* 184 Cal. 797, 195 Pac. 664; *Anderson v. Wickliffe,* 178 Cal. 120, 172 Pac. 381; *Rauer v. Hertweck,* 175 Cal. 278, 165 Pac. 946; *Marchetti v. So. Pac. Co.,* 204 Cal. 679, 269 Pac. 529; *Rabe v. Western Union Telegraph Co.,* 198 Cal. 290, 244 Pac. 1077; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Neblett v. Elliott,* 46 Cal. App. (2d) 294, 115 Pac. (2d) 872; *Easton v. Ash,* 18 Cal. (2d) 530, 116 Pac. (2d) 433.)

Every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts in favor of the plaintiff. (*Carter v. Canty,* 181 Cal. 749; *Smellie v. So. Pac. Co.,* 212 Cal. 540, 299 Pac. 529; *Hoffart v. Southern Pac. Co.,* 33 Cal. App. (2d) 591, 92 Pac. (2d) 436; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Hubbard v. Matson Navi-*

gation Co., 34 Cal. App. (2d) 475, 93 Pac. (2d) 846; *Rae v. California Equipment Co.,* 12 Cal. (2d) 563, 86 Pac. (2d) 352; *Dunlap v. Pacific Elec. Ry. Co.,* 12 Cal. App. (2d) 473, 55 Pac. (2d) 894; *Moffatt v. Buffums' Inc.,* 21 Cal. App. (2d) 371, 69 Pac. (2d) 424; *Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Wires v. Little,* 27 Cal. App. (2d) 240, 80 Pac. (2d) 1010, 82 Pac. (2d) 388; *Barnett v. La Mesa Post No. 282, American Legion,* 15 Cal. (2d) 191, 99 Pac. (2d) 650; *Estate of Burre,* 38 Cal. App. (2d) 518, 101 Pac. (2d) 549; *Slater v. Shell Oil Co.,* 39 Cal. App. (2d) 535, 103 Pac. (2d) 1043; *Laraway v. First National Bank of La Verne,* 39 Cal. App. (2d) 718, 104 Pac. (2d) 95; *Martin v. Tully,* 44 C.A. (2d) 226, 112 Pac. (2d) 282; *Darling v. Dreamland Bedding & Upholstering Co.,* 44 C.A. (2d) 253, 112 Pac. (2d) 338; *Amendt v. Pacific Elect. Ry. Co.,* 46 C.A. (2d) 248, 115 Pac. (2d) 588; *Brewer v. Southern Pac. Co.,* 29 Cal. App. (2d) 251, 84 Pac. (2d) 230; *Boellaard v. Crabbe,* 41 C.A. (2d) 792, 107 Pac. (2d) 951.)

The Court must take the view of the evidence most favorable to the plaintiff. (*Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Moffatt v. Buffums' Inc.,* 21 Cal. App. (2d) 371, 69 Pac. (2d) 424; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Barnett v. La Mesa Post No. 282, American Legion,* 15 Cal. (2d) 191, 99 Pac. (2d) 650; *Slater v. Shell Oil Co.,* 39 Cal. App. (2d) 535, 103 Pac. (2d) 1043; *National Auto Ins. Co. v. Cunningham,* 41 C.A. (2d) 828, 107 Pac. (2d) 643; *Reiman v. Moore,* 42 C.A. (2d) 130, 108 Pac. (2d)

452; *Anderson v. Stump,* 42 C.A. (2d) 761, 109 Pac. (2d) 1027; *Darling v. Dreamland Bedding & Upholstering Co.,* 44 C.A. (2d) 253, 112 Pac. (2d) 338.)

If the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the Court must take the view most favorable to the plaintiff. All the evidence in favor of the plaintiff must be taken as true, and if contradictory evidence has been given, it must be disregarded. (*Russell v. Smith,* 12 Cal. App. (2d) 399, 55 Pac. (2d) 562; *Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Hubbert v. Aztec Brewing Co.,* 26 Cal. App. (2d) 664, 80 Pac. (2d) 185, 1016; *Stone v. San Francisco,* 27 Cal. App. (2d) 34, 80 Pac. (2d) 175; *Wires v. Little,* 27 Cal. App. (2d) 240, 80 Pac. (2d) 1010, 82 Pac. (2d) 388; *Reiman v. Moore,* 30 Cal. App. (2d) 306, 86 Pac. (2d) 156; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Knecht v. Lombardo,* 33 Cal. App. (2d) 447, 91 Pac. (2d) 917; *Barnett v. La Mesa Post No. 282, American Legion,* 15 Cal. (2d) 191, 99 Pac. (2d) 650; *Slater v. Shell Oil Co.,* 39 Cal. App. (2d) 535, 103 Pac. (2d) 1043; *National Auto Ins. Co. v. Cunningham,* 41 C.A. (2d) 828, 107 Pac. (2d) 643; *Reiman v. Moore,* 42 C.A. (2d) 130, 108 Pac. (2d) 452; *Anderson v. Stump,* 42 C.A. (2d) 761, 109 Pac. (2d) 1027; *Darling v. Dreamland Bedding & Upholstering Co.,* 44 C.A. (2d) 253, 112 Pac. (2d) 338; *Neblett v. Elliott,* 46 C.A. (2d) 294, 115 P. (2d) 872.)

On such motion the Court has nothing to do with the credibility of the witnesses (*Knecht v. Lombardo,*

33 Cal. App. (2d) 447, 91 Pac. (2d) 917), nor with testimony tending to create a conflict (*Mitchell Camera Corporation v. Fox Film Corporation,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Knecht v. Lombardo,* supra; *Darling v. Dreamland Bedding and Upholstering Co.,* supra; *Williams v. Freeman,* supra), and on a motion for a nonsuit the trial Court may not weigh the evidence. (*Estate of Cushing,* 30 Cal. App. (2d) 340, 86 Pac. (2d) 375.) The rules as to nonsuit are the same whether the trial is by the Court or by a jury. (*Freese v. Hibernia Savings and Loan Society,* 139 Cal. 392, 73 Pac. 172; *Grummert v. Fresno Glazed Cement Pipe Co.,* 181 Cal. at p. 512, 185 Pac. 388; *Goldstone v. Merchants' Ice Co.,* 123 Cal. 625, 56 Pac. 776; *Marron v. Marron,* 19 Cal. App. 326, 125 Pac. 914; *Hercules Oil Co. v. Hocknell,* 5 Cal. App. 702, 91 Pac. 341.) And when a motion is submitted to a Court, acting also as a jury, it is not for the Court to base its determination of the motion upon what it might do in dealing with the facts as a jury, but solely upon the proposition of whether the facts as proved make it a *prima facie* case. (*Archibald Estate v. Matteson,* 5 Cal. App. 441, 90 Pac. 723.)

The rule governing nonsuit enforced by the California courts of *dernier resort* is well settled by the late Justice Seawell in *Gregg v. Western Pacific R. R. Co.,* 193 Cal. 212, 216, 223 Pac. 523:

> "It is important to keep in mind from the outset the well-established rules of law which must control this court in determining whether or not the motion of nonsuit was properly granted. In so doing we must view with reasonable favor the

evidence offered in support of appellant's case. 'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiff. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If contradictory evidence has been given it must be discarded. (*Estate of Arnold,* 147 Cal. 583.) The plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiff's claim. (*Anderson v. Wickliffe,* 178 Cal. 120.) Evidence whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly 'against the defendant, and if the plaintiff has introduced proof sufficient to make out a *prima facie* case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied. (*Bush v. Wood,* 8 Cal. App. 647; *In re Daly,* 15 Cal. App. 329; *Wasserman v. Sloss,* 117 Cal. 425; *Hoff v. Los Angeles Pacific Co.,* 158 Cal. 596; *Lassen v. Southern Pac. Co.,* 173 Cal. 71; *Kleist v. Priem,* 51 Cal. App. 32.)' (*Berger v. Lane,* 190 Cal. 443.)"

II.

GIVING THE APPELLANTS THE BENEFIT OF EVERY FAVORABLE INFERENCE FAIRLY DEDUCIBLE FROM THE EVIDENCE, A PRIMA FACIE CASE WAS MADE, AND THE TRIAL COURT COMMITTED ERROR IN DENYING THE MOTION TO DISMISS.

We have heretofore reviewed at considerable length the evidence in the record which reasonably tends to show that the deceased came to his death from accidental, violent and external means; to-wit, from terminal pneumonia resulting from an infection produced by a tick-bite. It was proven beyond all cavil that the tick which was found embedded in the body of the deceased was of the *dermacentor andersoni* species, which is a notorious carrier of Rocky Mountain spotted fever.

It is true that the connection between the terminal pneumonia which was the immediate cause of death and the tick-bite is based upon the history of the case and the opinion of the medical witnesses. Of course, no one actually saw the infection taking place within the living body of the deceased. That would have been impossible. The cause of death, like any other fact in issue, may be proven by circumstantial evidence, and it would be difficult in such a case to imagine more convincing proof. Here we have a man in the prime of his life, an athlete, a man accustomed to outdoor life, strong and healthy in every particular. He goes on a hunting trip. He goes into a region where the animals which he was hunting were infested by this disease-carrying tick. On his return from the trip the deceased himself and his companion saw one

of these ticks embedded in his flesh, and removed it. He returns to his home still apparently in the best of health, and is examined by a doctor, who pronounced him physically fit in every particular. Four days later he was dead, having developed in the meantime all of the characteristic symptoms of Rocky Mountain spotted fever. The doctor who attended him gave it as his opinion that the virus pneumonia from which the decedent died was the result of the fever produced by the poison transmitted by the tick, which is a notorious vector of the disease. The proof of the cause of death in such cases must of necessity depend primarily upon three things: (1) the history of the case; (2) the manifested symptoms; and (3) the opinion of the physician. In the very nature of the case, no other proof is obtainable.

If the evidence in the case at bar is not sufficient to entitle the appellants to a recovery, then we say in all sincerity that many defendants in criminal cases have been unjustly executed or sent to prison on weaker evidence.

A typical case is *People v. Long,* 15 Cal. (2d) 590, 103 Pac. (2d) 969. The issue in that case, which was a prosecution for murder arising out of an abortion, was whether the operation was necessary to preserve the life of the deceased. Numerous physicians testified that the decedent was suffering from *mitral stenosis,* a valvular disease of the heart, which causes the organ to become decompensated, death following as a result. Many respectable physicians testified that in their opinion the deceased would not have been

able to survive the normal delivery of a child, and the only testimony to the contrary was that of a pathologist who examined the body of the deceased after the autopsy and after it had been embalmed, and who gave his opinion that the operation was not necessary to preserve life. This pathologist never had seen the deceased during her lifetime, had never made any examination of her, and based his opinion solely upon an examination of the organ after it had been removed from the body by the autopsy surgeon. Nevertheless, the Supreme Court of California held that the evidence was sufficient to warrant the jury in finding that the operation was not necessary to preserve life, and confirmed a conviction of manslaughter.

The evidence is infinitely stronger in the case at bar, because we have here the testimony of the attending physician, the clinical history of the case and the presence in the blood specimens of the deceased of organisms which might be rickettsia, phenomena frequently present in cases of Rocky Mountain Spotted Fever but which may not appear where the onset of the disease is so rapid as in the case of Dr. Barr.

That the opinion of qualified medical witnesses taken in connection with the history of the case is sufficient to warrant a recovery.

It is elementary law that a physician may testify that a certain condition **might have** or would be **likely** to have resulted from a certain cause, and is permitted to state his inference as to the cause of certain injuries, of an observed physical condition, or of the death of a person. He may testify as to whether

certain detailed occurrences would be a natural, sufficient, probable, or possible cause of death.

In

Dow v. City of Oroville, 22 Cal. App. 215, 217, 134 Pac. 197,

it is said:

> "The opinions of medical doctors as to the manner in which or the means by which a person **may have received** physical injuries are always receivable in evidence as those of experts in such matters."

In

People v. Sampo, 117 Cal. App. 135, 149, 118 Pac. 957,

which was a prosecution for murder, the Court says:

> "Nor was it error, it may be observed, in this connection, to permit the physicians to testify that the wound **could have been inflicted** by means of said rock. The physicians were not asked by whom the wound was inflicted, nor whether the wound was caused by the use of the rock exhibited to them, but were simply asked whether, in their opinion, such a wound as the one they found on the head of the deceased could have been inflicted by means of the rock. Opinions of medical doctors as to the means which might have been employed in producing wounds upon the human body are always receivable in evidence as those of experts upon that proposition, and we know of no principle to which admission of such testimony is repugnant. The manner by which a wound is produced is as much within the range of subjects as to which opinions of experts may be given in

evidence as is the proximate or approximate cause of death, and **no one will dispute the competency, as evidence, of the opinion of a physician as to the direct or remote cause of one's death.**"

In

Schuh v. Oil Well Supply Co., 50 Cal. App. 588, 195 Pac. 703,

a doctor who examined the plaintiff about three months after his accident described the condition in which he found the patient, and testified that he could not say whether the condition was part of or resultant from any improper treatment prior to the time that he had made the examination. The Court said that the admission of the evidence was proper, and that whether or not the condition found by the doctor was one of the natural consequences of the accident was a question for the jury.

In

Travelers Insurance Co. v. Drake, 89 Fed. (2d) 47,

this Court uses the following language:

"No one is more able to testify as to the effect upon the human body or functions of organs of the human system of certain causes than those who by years of study and practice of medicine and experience possess. Doctors, being learned in the construction of the human body and the relation of the several parts to each other, may advise as experts what the necessary effect upon the vital spark which certain causes might produce. No layman can be credited with such knowledge. **A physician, as an expert, may state**

his opinion as to the cause of death, or whether given injuries or conditions would cause death."

The Court cites, *inter alia,*

People v. Potigian, 69 Cal. App. 257, 231 Pac. 593;

Foley v. Northern California Power Co., 165 Cal. 103, 30 Pac. 1183;

Spicer v. Benefit Association of Railway Employees, 142 Ore. 574, 17 Pac. (2d) 1107, 90 A. L. R. 1517;

Nicholson v. Roundup Coal Mining Co., 79 Mont. 358, 257 Pac. 270.

The Court then proceeds:

"The clinical history from the date of the accident to his death, supplemented by the findings of the autopsy and evidence of deceased's prior good health, was produced. Some factual evidence showed that deceased was physically and mentally active and energetic in his business, did not appear to suffer from any trouble of the heart, brain or kidneys, showed no inconvenience from sudden exertion, nor shortness of breath, no chest pains, no blurring of the vision, etc. From this evidence, and other testimony, stated in the hypothetical questions, two physicians testified that death was the result of the injuries, without any other contributing cause. * * * While the jury is the sole judge of the facts as to the issue of death, and causes of death, that does not, however, make objectionable the opinion of a medical expert in aid of the jury to find the ultimate fact."

The Court cites a number of Federal decisions in support of this statement.

See, to the same effect:

Haskell & Barker Car Co. v. Erickson, 73 Ind. App. 657, 128 N. E. 466;

Groves v. Webster City, 222 Ia. 849, 270 N. W. 329;

Bishop v. Shurly, 237 Mich. 76;

Spicer v. Benefit Association, 142 Ore. 574, 17 Pac. (2d) 1107;

Leavitt v. Bacon, 89 N. H. 383, 200 Atl. 399;

Browning v. Hoffman, 90 W. Va. 568, 111 S. E. 492.

Fortunately, there are a number of cases in which the Courts have had occasion to consider the sufficiency of the evidence to establish that death resulted from infection caused by the bite of an insect. One of these cases, to-wit, *Reinoehl v. Hamacher Pole & Lumber Co.* (Idaho), 6 Pac. (2d) 860,* involved a death caused by Rocky Mountain spotted fever originating in a tick-bite. The proceeding was brought under the Idaho Workmen's Compensation Law by the widow of the deceased to recover compensation for his death. The Industrial Accident Board denied workmen's compensation to the claimant, and its judgment was affirmed by the District Court on an appeal taken pursuant to the Idaho statute. This judgment was reversed by the Supreme Court of Idaho, and the case remanded

*This case is not listed in the Pacific Reporter Digest, and we have been unable, therefore, to cite the volume and page of the Idaho Reports where it appears.

with directions to award compensation to appellant. The facts are stated in the opinion of the Court as follows:

> "James Edward Pierce was employed as a swamper by the Hamacher Pole & Lumber Company, at a camp about four miles from Rathdrum, Idaho. He went to work on March 22, 1930, worked around the camp two or three days, and then went into the woods, where his working hours were from 8 a.m. to 5 p.m. Lunch was brought at noon each day to the workmen, by servants of the employer, and the employees ate such lunch in the woods, returning each night to the camp. Wood ticks were very plentiful on the brush in the woods, and fell upon Pierce and his fellow employees. While working it was not always noticed when a tick fell on a man, or when it bit him. On return to camp in the evening, it was customary for the men to strip and pick the ticks off each other and burn them. The camp was located in a five-acre clearing free of brush and ticks. All the men boarded and roomed in the bunkhouse at the camp, and while they were free to come and go as they pleased, after working hours, none of them left the camp at night. The evidence shows that wood ticks do not stay at camps, but infest the brush. Pierce was in Spokane from about March 1, 1930, until he went to work on the 22d. On April 3, 1930, he complained of having a headache and chills, but refused to go to a doctor. He did not get better, but worked through until Saturday night, April 5, when he was taken to Spokane, where he put up at the Fernwood Hotel. A brother, staying at the Galax Hotel, called on him, but was unable to procure a

physician on Sunday. On Monday, April 7, Pierce was taken by his brother to St. Luke's Hospital, where he died of Rocky Mountain spotted fever on the morning of April 9, 1930. The doctor testified that he had many insect bites, which were reported by those having the care of the patient before he entered the hospital as tick bites; that they conformed in every way to those produced by ticks; and that his opinion was that they were tick bites.

"The Industrial Accident Board found the facts substantially as stated; that Pierce **died of Rocky Mountain spotted fever; 'that said spotted fever was the result of a tick bite or bites'**; and that his death was not 'the result of a personal injury by accident arising out of and in the course of his employment.' On appeal, without any further testimony being taken, the district court found, in addition to the board findings, 'that said spotted fever was the result of a tick bite or bites received by said James Edward Pierce in the course of his employment, and while employed as a "swamper," as set forth in paragraph 3 of the findings.' The district court further found: '(7) That there remains but one other question and that is whether a tick-bite can be termed an accident. Taking the ordinary meaning of the word "accident", we are unable to find that a "tick-bite" is an accident.' * * *"

The Supreme Court of Idaho reversed the judgment, on the ground that the District Court had committed error in holding that death ensuing from a tick-bite was not an accidental death. It appears from the

opinion of the Court that the sufficiency of the evidence to justify the finding that the deceased died of Rocky Mountain spotted fever resulting from a tick-bite was unquestioned.

In

Omberg v. United States Mutual Accident Association, 101 Ky. 303, 40 S. W. 909,

the evidence was held sufficient to warrant the submission to the jury of the question whether the insured's death was caused by blood poisoning superinduced by the bite or sting of a mosquito; and it was held that, if they so found, his death was effected through "external, violent and accidental means." The Court said:

> "Whether the death of Omberg was caused by blood poisoning, itself superinduced by the bite or sting of some insect, was a question of fact for the jury; the affirmative of these propositions was supported by the evidence of the two attending physicians, and which is confessedly entitled to much weight. Even if we discard the statement of the patient that the spot on the foot was the result of the bite of a mosquito, we still have the condition of the inflamed part, which, in the opinion of an expert, presented such an appearance as might have been caused by the sting or bite of an insect. The jury might have reasonably concluded, from the evidence, that the injury to the toe was so caused, especially as such a condition is shown not to be an unusual result of such sting or bite. **The jury might also have believed that death was caused by blood poisoning induced by the sting or bite—they certainly**

might have so believed from the evidence of the attending physicians. When these conclusions on the facts are reached, we are of the opinion that, as a matter of law, the death of the assured could be as truly said to have been effected through 'external, violent, and accidental means' as though death had been caused by the sudden, unforeseen, and unexpected bite of a poisonous snake. The bite was external, violent and accidental. If a bite at all, it was certainly external. It came from without, and its marks were even visible to the naked eye. The force of it was not as great, perhaps, as if inflicted by a rattlesnake; but the means were not the less violent, within the meaning of the policy. It was also accidental, because unexpected, unforeseen, and happened as by chance. It was not designed or brought about voluntarily. But for it, the blood poisoning and death would not have resulted. The blood poisoning was consequent on the wound; the bite would, therefore, be the proximate cause of death."

See, to the same effect,

McAuley v. Casualty Co. of America, 39 Mont. 185, 102 Pac. 586; and

North Wildwood v. Cirelli, 29 N. J. L. 302.

In the latter case, the New Jersey Court of Errors and Appeals affirmed an award of compensation to the widow of a lifeguard, who claimed that the deceased met his death in the course of his employment from an infection from an insect bite. We set forth the statement of facts given in the opinion of the Court, as they are similar to those in the case at bar and were held sufficient to entitle the claimant to a recovery.

"We find the salient facts to be: On August 5th, 1940, decedent was in the employ of the City of North Wildwood as a life guard. In accordance with his prescribed duties he was clad in the regulation apparel of the municipal life guards, consisting of trunks and jersey, which left the arms, shoulders and legs exposed, and he was on duty from nine in the forenoon to five in the afternoon. Between two and three o'clock in the afternoon of that day, so clothed, while sitting in the performance of his duty on the life guard stand, he was bitten on the left forearm by an insect, probably by one of the many green-headed flies that had been brought in by a west wind and were at the time infesting the beach front. He slapped his arm, contemporaneously remarked that something had stung him and began scratching at a red spot that almost instantly developed. The arm became inflamed and much swollen. Within two days suppuration had reached the point that, upon pressure, pus discharged without incision. Cirelli became worse, suffered from chills and fever, had severe pains in the groin and was taken, on August 23d, to the Atlantic City Hospital. Despite hospitalization and medical treatment he died on September 24th from staphylococcemia, a pus condition which follows the introduction of staphylococcus bacteria into the bloodstream. **It was the opinion of competent medical witnesses, which we accept as correct, that the point of entry of the staphylococci was the weakened skin tissue at the locus of the insect bite. Death was the result of the insect bite.**"

There is extremely apposite language found in certain decisions of the Supreme Court of the United

States and other federal Courts. A few quotations will suffice:

> "In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the **jury** is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties."
>
> *New York Life Ins. Co. v. Gamer,* 303 U. S. 171-173, 82 L. Ed. 731.

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that **the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it.** Hart v. Newland, 3 Hawks, 122."
>
> *Home Ins. Co. v. Weide,* 78 U. S. 197, 198, 11 Wall. 438, 78 L. ed. 197.

In a case in which there was a pronounced conflict in the medical testimony as to the probable cause of death, the Court, in the case of *Commercial Travelers' Mutual Accident Assn. v. Fulton,* 93 Fed. 621, 622, uses this language:

> "On January 1, 1895, the insured, a man weighing from 180 to 190 pounds, while on the side-

walk, waiting for a street car, suddenly fell, striking upon an iron water spout which projected a few inches above the sidewalk, and which left external, visible marks upon his head and face, in the form of abrasions or bruises, not supposed at the time to be of a serious character. He died from 15 to 20 minutes after the accident, and was buried without any careful examination into the cause of death. Three months after interment the body was exhumed and an autopsy made. It is not disputed that, at the time of his fall, Fulton was affected with a diseased heart. The primary question in the case is whether the fall produced such an effect upon the brain that he died in consequence of the blow thus received, or whether the fall caused his death only by producing such an acute aggravation of the disease of his heart that he died, when a man with a reasonably healthy heart would have lived. The medical testimony is voluminous, and we have carefully examined it. That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict is no ground for disturbing such verdict, if there can be found anywhere in the record evidence sufficient to warrant the court in sending the case to the jury. That there was sufficient evidence to take the case to them, we have no doubt. Two, at least, of the physicians testified that, in their opinion, death was caused by an injury to the brain; such opinion being founded in part upon the assumption in the hypothetical question, which elicited such opinion, that immediately after the fall Fulton 'was unconscious, only exclaiming, "Oh!" as he was turned over; breathing hard, as if he was blowing something, and with a rattling noise; his face not pale, but fresh-looking; and died within fifteen minutes

to half an hour, without having regained consciousness'. These phenomena, they testify, are characteristic rather of a death from injury to the brain than from heart disease. **It is true that when, upon cross-examination, the condition of deceased's heart was disclosed to them, they both concede that the organic disease of the heart may have had something to do with the death;** but one of them, at least, at the very close of his testimony, testified that the injuries to the head and brain described in the narrative of the post mortem would have been sufficient to cause death, even in the case of a healthy heart. In view of this evidence, and of the testimony of those who saw him fall, and picked him up, that his condition, as to color, breathing, and apparent unconsciousness, was such as is described in the hypothetical question, it would have been error to direct a verdict for defendant."

In

Aetna Life Insurance Co. v. Wicker, 240 Fed. 398, 399

the Court, holding that the evidence was sufficient to show that the deceased met his death from appendicitis having a traumatic origin rather than from chronic appendicitis, uses the following language:

"It is alleged that on the 11th day of February, 1915, Wicker accidentally slipped while walking on an icy pavement in the city of Niagara Falls and fell upon his right side with his arm doubled up under him across the right side of the abdomen. He suffered much pain during that day, ate little and retired early. The pain increased during the next day. The night following the pain increased

and a physician was called. He found Wicker suffering from general peritonitis which about a week later resulted in death.

"An autopsy was requested and granted and all the physicians present, whether representing the plaintiff or the defendant, agreed that Wicker died of peritonitis or inflammation of the appendix. If there were nothing but the fall on the icy sidewalk, the bending of the arm under the abdomen and the paroxysms of pain constantly increasing until death ensued, the question would be one of fact for the jury to say whether the fall produced the disease which caused the death. It being a question where men learned in the medical profession might assist the jury in arriving at a correct result, it was proper that the jury should have the benefit of their experience. It is unnecessary to enter upon a detailed analysis of their testimony.

"Dr. Chapin, who saw Wicker after the accident, and was in consultation with Dr. Scott, the physician for the Wicker family, testified upon facts, some of which he knew and some of which were assumed. In answer to the question, 'What was the cause of the appendicitis from which he suffered?' the doctor answered, 'The fall on the sidewalk.' Dr. Bentz, called for the defendant, in answer to the question, 'What was the cause of his death?' replied, 'The cause of his death was a general purulent inflammation of the peritoneum or abdominal lining, that being due to a perforated appendix.'

"It is unnecessary to quote further from the medical testimony. **These answers present the two theories and it was for the jury to decide be-**

tween them. Upon the evidence the jury were justified in finding that the fall on the icy sidewalk produced the appendicitis which caused Wicker's death. That the question here involved is one of fact for the jury is sustained by an almost unbroken line of authorities."

CONCLUSION.

The foregoing authorities clearly hold that in such a case as the case at bar, the question as to the cause of death is a question of fact and not a question of law. Indeed, the evidence as to the cause of death is far stronger than in many of the cases heretofore cited in which the Courts held that a *prima facie* case was established. It was error, therefore, for the learned trial judge to grant the motion of the appellees in each case for a dismissal.

It is respectfully submitted that each judgment and order of dismissal appealed from should be reversed, and the causes remanded for a new trial.

Dated, San Francisco,
November 13, 1944.

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